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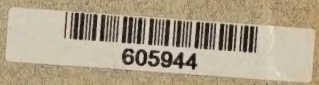
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REPORTS

FROM

COMMISSIONERS:

TWENTY-TWO VOLUMES.

—(5.)—

CAPITAL PUNISHMENT.

Session

1 *February* — 10 *August* 1866.

VOL. XXI.

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TWENTY-TWO VOLUMES:—CONTENTS OF THE

FIFTH VOLUME.

N. B.—*THE* Figures *at the* beginning of the line, *correspond with the* N° *at the foot of each* Report; *and the* Figures *at the* end of the line, *refer to the* MS. Paging *of the Volumes arranged for The House of Commons.*

CAPITAL PUNISHMENT:

3590.] REPORT of the CAPITAL PUNISHMENT COMMISSION; together with the MINUTES of EVIDENCE, and APPENDIX - - p. 1

REPORT

OF

THE CAPITAL PUNISHMENT COMMISSION;

TOGETHER WITH

REFORM CLUB
PALL MALL

THE MINUTES OF EVIDENCE

AND APPENDIX.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY GEORGE E. EYRE AND WILLIAM SPOTTISWOODE,
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY.
FOR HER MAJESTY'S STATIONERY OFFICE.

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COMMISSION.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith:

To Our right trusty and right entirely beloved Cousin and Councillor Charles Henry Duke of Richmond, Our right trusty and well-beloved Councillor Edward Henry Smith Stanley (commonly called Lord Stanley), Our right trusty and well-beloved Councillor Stephen Lushington, Doctor of Civil Law, Judge of Our High Court of Admiralty, Our right trusty and well-beloved Councillor John Taylor Coleridge, Knight, Our right trusty and well-beloved Councillor Thomas O'Hagan, Our Attorney General for Ireland, Our trusty and well-beloved James Moncrieff, Our Advocate for Scotland, Our trusty and well-beloved Horatio Waddington, Esquire, Our trusty and well-beloved John Bright, Esquire, Our trusty and well-beloved William Ewart, Esquire, Our trusty and well-beloved Gathorne Hardy, Esquire, Our trusty and well-beloved George Ward Hunt, Esquire, and Our trusty and well-beloved Charles Neate, Esquire, greeting:

Whereas the Knights, Citizens, Burgesses, and Commissioners of Shires and Burghs in Parliament assembled have presented to Us an humble address praying that We would be graciously pleased to issue a Royal Commission to inquire into the Provisions and Operation of the Laws under which the Punishment of Death is now inflicted in the United Kingdom, and the manner in which it is inflicted, and to report whether it is desirable to make any alteration therein.

Now know ye, that We, reposing great trust and confidence in your zeal and ability, have authorized and appointed, and do by these Presents authorize and appoint, you, the said Charles Henry Duke of Richmond, Edward Henry Smith Stanley (commonly called Lord Stanley), Stephen Lushington, Sir John Taylor Coleridge, Thomas O'Hagan, James Moncrieff, Horatio Waddington, John Bright, William Ewart, Gathorne Hardy, George Ward Hunt, and Charles Neate, to be Our Commissioners to inquire into the Provisions and Operation of the Laws now in force in the United Kingdom, under and by virtue of which the Punishment of Death may be inflicted upon persons convicted of certain crimes, and also into the manner in which Capital Sentences are carried into execution, and to report whether any, and if any,

what alteration is desirable in such Laws, or any of them, or in the manner in which such sentences are carried into execution.

And for the better discovery of the truth in the Premises, We do by these Presents give and grant to you, or any five or more of you, full power and authority to call before you, or any five or more of you, all such persons as you shall judge necessary for the purpose of making the aforesaid inquiry.

And We do also give and grant unto you, or any five or more of you, full power and authority to call for and have access to all such official books, documents, papers, and records as may afford the fullest information on the subject, and to inquire of and concerning the Premises by all other lawful ways and means whatsoever.

And Our further will and pleasure is that you do within six months after the date of this Our Commission, or as much sooner as the same can conveniently be done (using all diligence), certify to Us under your hands and seals, or under the hands and seals of any five or more of you, your several proceedings and your opinion touching the Premises.

And We further will and command, and by these Presents ordain, that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any five or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not contained from time to time by adjournment.

And We hereby command all and singular Our Justices of the Peace, Sheriffs, Mayors, Bailiffs, Constables, Officers, Ministers, and all other Our loving Subjects whatsoever, as well within liberties as without, that they be assistant to you and each of you in the execution of these Presents.

And for your assistance in the due execution of this Our Commission, We have made choice of Our trusty and well-beloved James Henry Patteson, Esquire, Barrister at Law, to be Secretary to this Our Commission, and to attend you, whose services and assistance We require you to use from time to time as occasion may require.

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster, the Eighth day of July, in the Twenty-eighth Year of Our Reign.

By Warrant under the Queen's Sign Manual.

C. ROMILLY.

SECOND COMMISSION.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith:

To Our right trusty and right entirely beloved Cousin and Councillor Charles Henry Duke of Richmond, Our right trusty and well-beloved Councillor Edward Henry Smith Stanley (commonly called Lord Stanley), Our right trusty and well-beloved Councillor Stephen Lushington, Doctor of Civil Law, Judge of Our High Court of Admiralty, Our right trusty and well-beloved Councillor Sir John Taylor Coleridge, Knight, Our right trusty and well-beloved Councillor Thomas O'Hagan, Our Attorney General for Ireland, Our trusty and well-beloved James Moncrieff, Esquire, Our Advocate for Scotland, Our trusty and well-beloved Horatio Waddington, Esquire, Our trusty and well-beloved John Bright, Esquire, Our trusty and well-beloved William Ewart, Esquire, Our trusty and well-beloved Gathorne Hardy, Esquire, Our trusty and well-beloved George Ward Hunt, Esquire, and our trusty and well-beloved Charles Neate, Esquire, greeting:

Whereas We did by Our Commission under the Great Seal, bearing date the Eighth day of July now last, constitute and appoint you, the said Charles Henry Duke of Richmond, Edward Henry Smith Stanley (commonly called Lord Stanley), Stephen Lushington, Sir John Taylor Coleridge, Thomas O'Hagan, James Moncrieff, Horatio Waddington, John Bright, William Ewart, Gathorne Hardy, George Ward Hunt, and Charles Neate, to be Our Commissioners to inquire into the Provisions and Operations of the Laws now in force in the United Kingdom, under and by virtue of which the Punishment of Death may be inflicted upon persons convicted of certain crimes, and also into the manner in which Capital Sentences are carried into execution, and to report whether any, and if any, what alteration is desirable in such Laws, or any of them, or in the manner in which such sentences are carried into execution.

And for the better discovery of the truth in the Premises, We did give and grant to you, or any five or more of you, full power and authority to call before you, or any five or more of you, all such persons as you should judge necessary for the purpose of making the aforesaid inquiry.

And We did also give and grant unto you, or any five or more of you, full power and authority to call for and have access to all such official books, documents, papers, and records as may afford the fullest information on the subject, and to inquire of and concerning the Premises by all other lawful ways and means whatsoever.

And Our further will and pleasure was that you should within six months after the date of Our said Commission, or as much sooner as the same could conveniently be done (using all diligence), certify to Us under your hands and seals, or under the hands and seals of any five or more of you, your several proceedings and your opinion touching the Premises.

And We did further will and command that Our said Commission should continue in full force and virtue, and that you Our said Commissioners, or any five or more of you, should and might from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And Whereas it has been humbly represented unto Us that it would be expedient to extend the period within which you, Our said Commissioners, were by Our said Commission required to make your report.

Now know ye, that we have extended, and by these Presents do extend, the duration of Our said Commission to the Eighth day of January 1866, for the purpose of enabling you, Our said Commissioners, to complete the inquiries thereby required to be made and to make your final report thereon.

And Our will and pleasure is that, upon due examination of the Premises therein mentioned, you Our said Commissioners, or any five or more of you, do on or before the Eighth day of January 1866 report to Us, under your hands and seals, your several proceedings by virtue of Our said recited Commission, and of these Presents, together with what you shall find touching or concerning the Premises upon such inquiry as aforesaid.

In Witness whereof We have caused these Our Letters to be made Patent.

Witness Ourself at Westminster, the Fifth day of January in the Twenty-eighth Year of Our Reign.

By Warrant under the Queen's Sign Manual.

C. ROMILLY.

MALL

SUMMARY OF THE EVIDENCE.

Summary of the Evidence as to the Deterrent Effect of the Punishment of Death.

*** The numbers refer to the answers of the different witnesses in the Minutes of Evidence.

The Right Hon. Lord Cranworth.

Secondary punishment is not sufficiently deterring, but the fear of death is so more than any other. The crime of murder requires the most deterring punishment. The criminal class think that if death ensues from the crimes in which they are engaged they will be hanged; this has a most salutary effect upon their minds. The abrogation of the punishment of death for robbery by open force when unaccompanied by homicide has much diminished the number of homicides that were committed before that abrogation; 2. The witnessing an execution has a deterrent effect upon the criminal class; 91. Death has greater effect upon the minds of criminals than any other punishment, and a commutation is considered by them as the greatest boon; 110. Criminals do not calculate upon their chances of life and death; 111, 112.

The Hon. Baron Bramwell.

Would retain Capital Punishment in cases of murder; 131. Would not do so in treason unless accompanied with murder; 133. Persons of weak intellect are amenable in some degree to a threat of remote punishment; 155, 156.

The Hon. Baron Martin.

To form a real judgment of the deterrent effect of Capital Punishment recourse must be had to persons who are well acquainted with the lower classes; 245. The passing of the sentence of death is most impressive. No other sentence has such an effect on the bystanders; 246, 247. Has never conversed with the lower classes to ascertain their feelings, but thinks that death must be a great deterrent; 252. Juries are not deterred from finding a man guilty of murder by the knowledge of what will be the effect of such a verdict; 286.

The Right Hon. Lord Wensleydale.

Punishments by torture would have a greater deterrent effect than death, but they would not be tolerated by the public; 330. If Capital Punishment was abolished there would be an increase of crime. The punishment which conveys the greatest fear makes the strongest impression upon the public; 347. Murder is very often committed in a thoughtless moment, but if Capital Punishment was abolished murder would be more common; 348. Cases exist in which Capital Punishment has been withdrawn and the number of offences has afterwards increased. It turned out to be considerably so when Sir James Graham was Secretary of State. There is an increase of rape in Scotland; 349.

The Right Hon. Spencer Horatio Walpole, M.P.

Capital Punishment confined to murder would be a deterrent. Penal servitude for life cannot have so deterring an effect as death. The deterring effect of Capital Punishment is much stronger on the minds of the public than any alternative punishment. If it is confined to treason or murder a better system of law would exist than if it was abolished; 564.

The Hon. George Denman, M.P.

Thinks that on the whole more is done by Capital Punishment, as it at present exists, to induce murders than to prevent them; 727

Lieut.-Col. E. W. Y. Henderson.

The fear of death is the strongest deterrent. The strongest passion the lowest of criminals have is the love of life, and the fear of losing

that is, of course, the greatest deterrent; 805. In Western Australia the crimes of rape and burglary with violence, being armed, were punishable with death. At the outset it was found that there was a strong tendency on the part of the convicts to assault their officers, and it was determined to put the law in force in the next case. A warder was cut down with a spade by a convict. The convict was hanged, and from that time the crime ceased. It was the same with rape; 806. The criminal is overcome at the thought of being hung; 823. The change to the punishment of death had the effect of stopping certain offences; 824.

Mr. Thomas Kittle.

An execution has a deterring influence in the commission of murder; 897. The lowest classes express satisfaction at a murderer meeting death; 898. Capital Punishment deters the lower classes from committing murder; 901. This is to be inferred from the love of life; 902. Has heard prisoners say that they would rather be transported three or four times over than be hung. They have a great horror of being "scragged;" 904, 905. Believes that the sentence of death has a strong deterring influence in preventing the commission of murder; 916. Criminals treat secondary punishment lightly, but have a great horror of being executed; 925. At Müller's execution the expression of the feeling of the bystanders was that he deserved death; 940. And the same was the case when he was brought to Bow-street to be examined; 941. If desperate characters knew that the punishment of death was abolished, they would not hesitate to commit murder to liberate themselves from custody; 959.

Mr. Richard Tanner.

Criminals are deterred from committing murder by the fear of Capital Punishment. Many murders would be committed if criminals were not punished capitally; 982, 985–988. Some men do not mind penal servitude for life; 991, 998, 999, 1001. Old thieves know what punishment will follow their crimes; 1004. Has great opportunities of seeing the criminal classes. Has heard them discuss the subject of punishment. They attach great importance to the difference between being hanged and being imprisoned for life from the dread of being hanged; 1011–1017. Old thieves are seldom executed; they always stop short from the fear of Capital Punishment; 1018–1021. Penal servitude would not be a deterrent with old offenders; 1031.

Sir Fitzroy Kelly.

The system of Capital Punishment has no substantial effect in deterring from the commission of crime; 1039–1060. Thinks the most severe secondary punishment that could be devised would be equally deterrent; 1039. In considering the deterrent effect of Capital Punishment, the character, habits, and general nature of the criminal class must be considered. Agrees with the opinion expressed by Alderman Harmer, that those who are not deterred from crime by secondary punishment will not be deterred from murder by the capital penalty; 1060.

The Rev. J. Davis, M.A. (Ordinary of Newgate).

Attended 24 executions at Newgate; 1150. It is impossible to avoid executions; 1154. The incorrigibles could not be restrained if Capital Punishment was abolished; 1155. There are criminals in Newgate and everywhere else that are only restrained from murder by feeling that they will be hung if convicted; 1156. These criminals would commit murder from motives which would not act on other people. It would be dangerous to warders to watch prisoners under penal servitude for life if Capital Punishment did not exist; 1158. Death deters old offenders from committing murder; 1164. An old offender is rarely confined as a murderer; 1166. Incorrigibles will always exist; 1168. Warders would be in danger in watching over criminals under penal servitude for life if Capital Punishment was abolished; 1169. If the punishment of death was abolished it would have to be renewed in a year or two; 1179. Thinks the probability of being hanged produces no effect upon the mind of a person contemplating the commission of murder; 1185. But

a prisoner under sentence of death would accept any secondary punishment, however severe, as a boon; 1188. Professional thieves are restrained from murder through fear of Capital Punishment; 1192, 1193. Remembers a man of the name of Horler being hung for murdering his wife who stated that he would not have committed the crime had he known that he would have been executed; 1197. Forms the above conclusions from conversations with thieves and burglars after their conviction; 1203–1215.

Mr. William Tallack.

From documents received from the Governors of several of the American States it appears that the abolition of Capital Punishment there has not rendered life less secure; 1302. In 1848 the Cantons of Freiburg and Neufchatel, in Switzerland, abolished Capital Punishment, and there crime against life and safety has not increased since that period. A restoration of the punishment was called for, but after an official investigation it did not appear that crime had increased from the abolition of Capital Punishment; 1304. In 1864 the Canton of Zurich abolished Capital Punishment; 1307. In Tuscany it was abolished and afterwards re-imposed, but now it is again abolished; 1311. The punishment of death is deterrent to a certain class, provided it be inflicted with absolute certainty, though in cases of passion, drunkenness, or jealousy that would not apply; 1345. Alludes, as an example of the non-deterrent influence of Capital Punishment, to the peculiar failure it has in the repression of regicidal crimes. During the commencement of the reign of Louis Philippe there was a regicidal mania. In the early part of that reign there was the usual course taken of trial and execution; but after that course was abandoned, and the offender was consigned to a mad-house, there was no repetition of the crime; 1349. The crime of murder has diminished in those countries where executions do not take place, especially in Belgium; 1350.

Lord Hobart.

Capital Punishment is not a deterrent. With secondary punishment there might possibly be a gain of a deterrent force; 1369. Thinks that if Capital Punishment could ever be carried out with the same certainty and rigour as secondary punishment, it would be a more powerful preventive of crime, but the case is very far from being so; 1416, 1417. Thinks that the deterrent advantages of Capital Punishment are more than counterbalanced by its accompanying disadvantages, namely its uncertainty, 1421.

Sir George Grey, Bart., M.P.

In cases of murder Capital Punishment cannot safely be dispensed with. Thinks it must have a deterring effect in many cases. Reason in many cases of murder has no influence over the passions, but in premeditated murder the fear of death must have a very deterring effect; 1446. Murder is not increasing, and this is to be attributable to the penalty attached to it. Thinks that criminals are deterred from taking away life in the accomplishment of their crimes by the fear of death; 1447, 1448. If the punishment of death was taken away great apprehension would be excited, and a precaution would be gone that operates for the protection of life; 1528. A burglar or a robber makes a distinction between Capital Punishment and the punishment next to it, and is deterred from the crime which subjects him to the penalty of death; 1623. Professed burglars act with method and great coolness, and not being under the influence of passion the present law has a deterring effect; 1625.

Hilary Nicholas Nissen, Esq.

Public punishments have no deterring effect upon the people; 1646. Nor has Capital Punishment any deterring influence upon the criminal class; 1690–1712.

Henry Avory, Esq.

Thinks that burglars, &c. are prevented from adding murder to their crimes by the fear of Capital Punishment; 1870, 1871. The punishment of death is useful in the almost entire prohibition of murders amongst the criminal class. But where murder is committed through revenge, jealousy, or anger, the consequences are never considered; 1890. The

first desire of murder may occur to a man who resolves afterwards not to do it, simply from the dread of the consequences; 1900. Would not abolish the punishment of death, since it undoubtedly restrains the criminal class from murder; 1902. An enormous class of persons are unrestrained by religious or moral considerations; 1903. The highest punishment must in many instances deter persons from committing crime; 1906. The punishment of death has its efficacy upon every one in preventing murder; 1916. In 999 cases out of 1,000 a prisoner is prostrated and crushed upon receiving sentence of death; 1925.

Leone Levi, Esq.

Capital Punishment is not much of a deterrent to criminals, as is proved by the number of suicides; 1943, 1951–1953.

James Fitzjames Stephen, Esq.

Capital Punishment deters people from crime more than any other punishment. The horror of the punishment gives people a horror of the crime; 1980*a*.

The Hon. Sir James S. Willes.

Capital Punishment ought to be retained for murder; 2022–2030.

The Rev. John Jessop.

Capital Punishment has not the deterrent effect it is supposed to have; 2263. Does not think that when persons commit murder they think of detection. When persons commit a murder or plan it, they do not think that they will be found out; 2264. In cases of murders for sordid purposes, or murder by poison where property is involved in the result, if persons imagined that they would be found out they would not commit them; 2265. If persons imagined they would be found out they would not commit murder, unless they were maniacs; 2267. As to cases of murder through jealousy, hatred, or any strong impulse, the consequences are never taken into consideration; 2270.

Mr. Thomas Beggs.

Capital Punishment is not a deterrent; 2344. (See his paper read at the Annual Meeting of the National Association for the Promotion of Social Science held at York, September 1864, and which will be found in his evidence.)

Thomas Harrington Tuke, Esq., M.D.

Some insane people are restrained by the fear of punishment; 2404.

John Humfreys Parry, Serjeant-at-Law.

Capital Punishment is not a deterrent; 2501. When Müller murdered Mr. Briggs the idea of Capital Punishment never entered his mind. The majority of murderers do not belong to the criminal class; 2506. The punishment of death has a terror for certain minds when they come face to face with it; 2587.

Capt. Cartwright.

The punishment of death is not deterrent to the reckless class; 2660. The convict class dread perpetual imprisonment more than death; 2661–2665, 2666. Penal servitude for life has also greater terrors than hanging; 2677.

Sir Lawrence Peel.

In India Capital Punishment would be no deterrent, as death is feared very little.

The Right Hon. James A. Lawson (Attorney-General for Ireland).

The substitution of secondary punishment would be equally as deterrent as the capital penalty; 2960. The fear of death has no deterring effect in agrarian murders, from its uncertainty of infliction; 2964.

Mons. Chédieu.

The penalty of death is not a deterrent; 3183.

Lord S. G. Osborne.

Thinks it doubtful whether the general opinion as to the deterrent effect of Capital Punishment is well founded. Mankind set a high value on life, yet for ever risk it for little gain, for the prospect of little present enjoyment.

Very many criminals go to the gallows with the utmost hardihood; a crowd look on who they know to admire pluck shown on the scaffold, they have therefore a powerful motive to show it; their conduct proves death has but little action as a thing they dread.

The conduct of the spectators is altogether inconsistent with the idea that the scene has any great deterrent effect on themselves.

Burglars who plan a robbery, if they have been previously convicted, know that if now detected they will have a heavy sentence; to avoid the being identified in their deed they are prepared to murder those who may surprise them in it. They do not go to murder, but to rob, but are ready to murder if detected robbing.

Possible murder being, then, an element in a planned burglary, if Capital Punishment had a strong deterrent effect we should not have so many of these burglaries.

The ignorant and low-bred classes regard the gallows as the normal end of ill-luck in a course of crime. A large proportion of those executed have belonged to these classes; the prospect of the gallows has not acted as a deterrent to them.

Where murders proceed from strong provocation, jealousy, a sense of deep injury, evil passions excited by drink, "no fear of death, even if "the rack should precede it, would have power to deter."

The value set on life by the State makes it ready to commute the sentence of death on any reasonable grounds; this necessarily gives some uncertainty to the action of the law. The possible chance of escape may then have some effect in decreasing the deterrent effect of Capital Punishment; it is doubtful, however, how far this chance of escape ever checked an intention to murder when the mind was deliberately set upon it; 3261.

Juries naturally incline to find excuse to return the verdict of manslaughter; this also gives some uncertainty as to the operation of the law; 3282.

The Rev. W. C. Osborn.

Capital Punishment is not a deterrent; 3497. It has no effect upon the individuals on whom it would be desirable to have an effect; 3508.

Sir Mordaunt Wells.

In India Capital Punishment ought not to be abolished against the Europeans; 3640. Would retain Capital Punishment in England; 3662.

Summary of the Evidence as to the Nature of Capital Punishment; its difference from all other Punishments in its Irrevocability, &c.

Lord Cranworth.

Cannot deny the absolute possibility of hanging an innocent man by mistake, but thinks such a possibility would only arise from not properly distinguishing between murder and manslaughter.

The common saying is perhaps a true one, that it is better for nine guilty persons to escape than one innocent man to be hanged, but it would not be better for 999 guilty to escape than for one innocent one to suffer; 117.

Lord Wensleydale.

Is not aware of any capital case in which he thought the verdict ill-founded; 345, 398.

Has never (in 30 years' experience) tried a murder case in which any error occurred through a mistake of identity; 398–401.

Hon. G. Denman, M.P.

Has never known a person convicted of murder whom he thought innocent; 706.

Sir Fitzroy Kelly, Q.C., M.P.

After careful consideration and examination, has come to the conclusion that it is not in any way reasonably to be doubted that in many instances innocent men have been capitally convicted, and in certain

numbers of instances, few of course, but yet formidable numbers, have been actually executed ; 1054.

In civil cases for minor offences erroneous verdicts often occur, why should murder trials be exempt from similar errors?

Indeed, murder trials often present the utmost difficulty and complexity of evidence, so much so, that not only are scientific men of the highest eminence arrayed in numbers on opposite sides, but also there often exists the greatest possible difficulty in even stating the facts of the case with sufficient intelligibility for the comprehension of an ordinary jury. Admits the great care taken to avoid erroneous convictions or executions ; but, in view of what has occurred, and may occur, thinks that if only 20 or 30 innocent men have been condemned to death during the last 50 years, and any substantial portion of those convicted ones have been executed, then this is sufficient to warrant the disuse of the capital penalty ; 1055.

Well remembers that there were, between the years 1802 and 1840, 22 cases of capital convictions, seven of which resulted in the execution of the convicts, and in the rest of which the sentence was mitigated, or a pardon granted. But in the whole of the 22 cases the innocence of these persons was established, or, at least, established satisfactorily to those who investigated the matter, and in most of the cases to the satisfaction of the advisers of the Crown ; 1055.

Instanced the case of the man Chalker, executed (about 1835) at Ipswich for the murder of a gamekeeper. Another man afterwards confessed on his death-bed the perpetration of the murder, and it further appeared that Chalker was not one of the guilty parties at all ; 1056–1059.

Instanced the case of a man pardoned the day before the one fixed for his execution, who was proved innocent of a murder for which he had been condemned by L. C. J. Tindal, who had seen no reason to doubt the man's guilt, yet his innocence was proved only just in time to save his life ; 1059.

Referred to the evidence of Sheriff Wilde, who in the single year of his office (1828) successfully interposed to prevent the executions of five men about to suffer death. By his efforts Sir Robert Peel, then Secretary of State, was convinced of their innocence ; 1060–1063.

There is presumptive ground for believing that innocent persons have suffered death for want of having influential or wealthy friends to procure an investigation of their case, or to make such efforts as were successful in the instances of Kirwan, Dr. Smethurst, and others ; 1063–1074.

Thinks that in poisoning cases, in particular, there is the greatest possible danger of the conviction and even execution of innocent men.

Instanced a capital case in which after Judge Vaughan, who passed sentence, had repeatedly refused to entertain a certain objection as valid, and left the prisoner for execution, nevertheless 11 other Judges were unanimously of opinion that the objection was a good one, and the sentence was commuted ; 1075.

Rev. John Davis.

Has never known an innocent man hanged, but has known punishment erroneously inflicted for other offences ; 1240–1242.

Mr. William Tallack.

Referred to several recent cases of mistaken convictions, showing the continued existence of a certain degree of danger of taking away innocent life under a system of capital penalties.

Instanced, amongst others, the case of Charles Mallet sentenced to death in London in 1854, on apparently very clear and decisive evidence, for an atrocious assault with robbery on a female. He was subsequently proved entirely innocent of the offence, and received a free pardon ; 1324–1326.

Lord Hobart.

Objects to Capital Punishment because it alone is, of all punishments, both irrevocable and irreparable. Other punishments also are irrevocable, but no other punishment is irreparable ; 1369.

Argues that innocent persons must frequently be convicted, and thinks it quite possible that such are occasionally executed ; 1370.

RIGHT HON. SIR G. GREY, BART., M.P.

Does not remember (whilst Home Secretary) a single case in which a man convicted of murder received an absolute pardon as being wholly innocent. Nor does he remember (in that period) a single case in which, after conviction and execution, any reasonable doubt has ever been raised of the guilt of the person convicted; no subsequent fact has come to light, no subsequent evidence has been even suggested or tendered, which could throw a doubt on any case in his experience in which the sentence of the law has been carried into effect.

There have no doubt been cases where the verdict has not been satisfactory to the Judge or to the Home Secretary, and where the sentence has been commuted, but he does not remember any case in which the innocence of a man convicted of murder has been established; 1450, 1451.

PROF. LEONE LEVI.

Referred to the recent Saffron Hill murder (Pelizzoni and Mogni) as a fresh instance of the danger of an irrevocable judicial mistake.

Also instanced the case of Mr. Barber a solicitor transported to Australia for a charge of forgery. After many years he was proved innocent, and his punishment not being capital admitted of some reparation being made him; 1972.

MR. J. F. STEPHEN.

Three cases (but not capital ones) came under his own observation in one year where people were pardoned subsequently to conviction on the ground of innocence, yet in all those cases there was perfect evidence to convict upon; 2222, 2223.

REV. JOHN JESSOP.

Has not the least doubt but that every person executed at Horsemonger Lane gaol during the period of his chaplaincy there was guilty; 2335.

MR. THOS. BEGGS.

Says there have been some, though not many, capital convictions of innocent men during the last 20 years.

Alluded particularly to the case of William Ross executed at York in 1850. Many persons, including the governor and chaplain of the gaol, were strongly of opinion that Ross was innocent; 2378.

Referred to several similar judicial errors in cases of rape, not however capital, but contends that if such occur in cases not capital, they may also happen in those which are capital; 2380–2385.

DR. T. H. TUKE.

Did not enter on this part of the question, except in so far as he has known a person morally innocent, on the ground of irresponsible insanity, put to death of late years, (Fooks, a farmer at Dorchester); 2435–2438.

MR. SERJEANT PARRY.

Objects to Capital Punishment as being irrevocable and irremediable, and does not think that any human tribunal should place itself in a position of being incapable, even at the last moment, of doing justice to an innocent man; 2498.

THE ATTORNEY-GENERAL FOR IRELAND.

Thinks that what operates upon juries is the taking away of human life, and doing an act, which if wrong, will be doing an irreparable injury; 3081–3083.

And that such a liability to irreparable mistake would not exist in the case of any other punishment, or at least it would be much less probable; 3084.

M. EMILE CHÉDIEU.

In France there have been of late years some innocent men sentenced to death, some of whom were executed, and some not. Instanced the case of a schoolmaster, who was tried for assassination, arson, and theft. Does not know of any case where the evidence was stronger against a man than it was in that case, and yet the jury found extenuating circum-

stances, and the man was sent to hard labour for life. Several years afterwards it was discovered that some other men were the guilty parties, and they were tried and convicted; 3201.

LORD S. G. OSBORNE.

It is a punishment admitting of no remission or alleviation; as such, could only be just where it is allotted on evidence which must be infallible.

It negatives the fact that no human evidence can be secure from error; that, even if the evidence on which the prisoner is convicted be correct, it is possible that evidence which could have given it a different complexion did exist, although it was not adduced.

It shuts out from all future remedy any of the mischances to which all human justice must be liable.

No state would make any other sentence irrevocable, laying it down as law, that if it afterwards appeared the prisoner had been improperly convicted, he was yet to suffer his entire sentence.

Admitting all human law must in execution be subject to occasional error, there is the greater reason to take care that no sentence of the law should be of an irrevocable nature.

The Christian religion leaves open hopes of pardon to the worst of men on repentance; when a man is hung you cut him off from power to repent.

When hanging was the punishment for so many offences, the multitude of executions proved how little it was deterrent.

You hang only for murder; a crime admitting of more degrees of guilt than any other, in regard to the motives which lead to it. Can it be consistent with justice to so confound all the principles of law, which professes to deal with crime according to its measure of guilt. Murder may be the worst of crimes *per se*, but it is far from always being that of the worst of men.

There are passions, elements of our common nature, so susceptible to intense provocation, and under it so difficult to guide or control, having a direct tendency to lead us at the moment to acts of violence, that admitting, for the general good, they must be curbed as far as possible, we yet know that at times no fear, even of death, can master them. If this is true with regard to the educated, the carefully trained, it has a far stronger relation to the condition of mind of the ignorant and low bred.

As we now carry out the law we show no difference to the result of a common human infirmity, aggravated as it may be by want of education, and the utter absence of all early right training, and the guilt which is the result of deliberate consideration long before its commission, the criminal, perhaps, being one who has had every chance in life of learning what is right, and how to struggle against what is wrong; 3261.

COLONEL STACE.

Thinks that Capital Punishment is objectionable in its nature, inasmuch as if you once hang a man you cannot bring him to life again, but if you transport him for his natural life, and if anything arises to cast a doubt upon the verdict, he can be restored to his freedom; 3451, 3452.

REV. W. C. OSBORN (Bath Gaol).

Being fallible creatures we should so punish as to have the power of reparation; 3497.

M. VISSCHERS.

Objects to the punishment of death on the ground of the liability to mistake. Instanced the case of three hawkers condemned to death in Belgium in 1842 after being found guilty by a jury. The Court of Appeal (Cassation) concurred with the majority of the jury as to their guilt. The King commuted their sentence to one of perpetual imprisonment. It was afterward shown that they were innocent, when the three were discharged and received an annuity for life; 3583.

Summary of the Evidence as to whether Juries show Reluctance to Convict in Capital Cases.

The Right Hon. Lord Cranworth.

Juries wish to rid themselves of the responsibility of finding a man guilty of a capital offence; they would almost always say that there were extenuating circumstances; 23. Juries now recommend to mercy on the ground of provocation, which recommendation is conveyed to the Crown; 33. In cases of infanticide juries always convict for concealment of birth where there is little doubt the child has been destroyed by its mother; 55, 56, 57. Remembers one or two instances of juries acquitting prisoners of murder against evidence; 98. A man was tried for murder attended with highway robbery and acquitted, but was afterwards tried for the robbery on the same evidence and found guilty; 101.

Mr. Baron Bramwell.

Juries acquitting a prisoner in order to preserve life is not to any great extent an impediment to the administration of justice; 184, 185. Juries always find for the lesser offence, unless it is such a case that they cannot shut their eyes to it; 194, 195, 196.

Mr. Baron Martin.

A jury is not likely to find a man guilty of murder unless it be a murder. Never knew of such a case but once. A woman was indicted for the murder of her child. It was so unlike murder that it was not necessary to occupy much time in summing up. It was a case of manslaughter, and it was thought that the jury would at once find her guilty of that offence, but was astonished to find the jury return a verdict of murder; 283. Juries' verdicts are honest; 285. They are not deterred in finding a man guilty of murder, through fear of the consequences; 286. Juries are always attentive in capital cases, and weight is given to everything, both in conviction and acquittal; 287. Never found any difficulty with a jury; 292.

The Right Hon. Lord Wensleydale.

Juries generally do their duty in most criminal cases. They more frequently do right than wrong in capital cases; 344. Remembers no capital case in which the verdict was ill-founded; 345. Juries generally find the lighter offence, but if the Judge takes proper care, the jury will do their duty; 391.

The Hon. George Denman, Q.C., M.P.

Capital Punishment leads to the acquittal of many men who would otherwise most certainly be convicted; 590. Juries are indisposed to convict in capital cases; 592. The case of Elizabeth Avis Law, Maidstone Spring Assizes, 1855, cited, in which the prisoner was acquitted, and it was supposed that some of the jury were opposed to the punishment of death; 593, 596, 597. Palin's case cited, Kent Winter Assizes, 1855, a strong instance of Capital Punishment protecting a guilty man; 623–625. Refers to several other cases illustrating his great objection to Capital Punishment; that juries have not fortitude, so far as their duty is concerned, to carry it into execution; 687. Certainty of conviction much greater where the punishment is not capital; 694. Probability of Home Circuit juries taking a stronger view against Capital Punishment than juries from other counties; 650. In capital cases of poisoning scientific evidence is frequently used for the purpose of deluding the jury; 668–670.

Sir Fitzroy Kelly, M.P.

Scientific evidence is either unintelligible to ordinary juries, or may be presented in such a manner as to lead experienced men to opposite conclusions; 1055. Juries disposed to be lenient in capital cases; 1093.

Mr. William Tallack.

Mentioned case in 1856 of a juryman being excused from serving on account of his opposition to Capital Punishment. Cited similar case in

1863; 1328. Difficulties would not arise amongst jurymen if the penalty was not capital; 1329.

The Right Hon. Sir George Grey, Bart.

Juries generally yield to the opinion of the Judge. Mentions a case where the jury asked a Judge whether they could bring in a verdict of manslaughter? The Judge said "No; it is either murder or nothing;" and they found a verdict of "Not guilty." They would have found a verdict of manslaughter if they could; 1498, 1499. Less disposition, perhaps, on the part of juries to find a woman guilty than there would be in the case of a man; 1538.

Henry Avory, Esq.

Sometimes in case of homicide the greater crime will come in for the smaller punishment from varying character of juries; 1781. In forgeries and other cases juries have returned verdicts against evidence; 1802. Never found a jury acquit in cases of murder without a reasonable cause; 1853. Never found a jury to hesitate in finding a verdict for murder upon proof; 1860–1864.

James Fitzjames Stephen, Esq.

Cites case of Moody at Lincoln in 1859 to show that juries violate the definition of murder in order to meet their opinion of the substantial justice of the case; 2004–2008.

Mr. Justice Willes.

Does not think juries shrink from convicting in cases of real murder; obliged to use the word *real;* 2082.

Mr. Beggs.

Cites case of José and others at Bodmin, 1856, in which verdict was evidently a compromise on part of jury from their reluctance to convict.

Also case of Harmon, Central Criminal Court, 1858, where jury found verdict of manslaughter, where the Judge observed that he should not have been dissatisfied with a verdict of murder, and that if such latter verdict had been found the prisoner would certainly have been hanged; 2356.

Also case of Hurley at Leeds, 1863, where Baron Martin said to jury,—"I regret extremely to hear that you have been driven only to "a conscientious verdict of guilty of murder by the belief that the "sentence would not be carried into execution. I am bound to say "that that is a view not proper for a jury to take"; 2356.

Juries not having more liberty sometimes take the law into their own hands, and break their oaths; 2153. Juries are more careful in proportion to the gravity of the punishment; 2218. As long as the law keeps within certain limits, the jury will do their duty; 2219. Recommendations to mercy are capricious; 2220. Does not know of a single case where a man was recommended to mercy who was hanged; 2221. The standard upon which juries convict is not too high; 2226.

Mr. Serjeant Parry.

There are numerous cases in which juries are unwilling to convict on the capital charge; 2498. Juries frequently, rather than find a verdict of murder, acquit altogether, although satisfied in their own minds of the criminality of the prisoner, though not to the degree of murder; 2499. Pelizzioni's case cited; 2525. Cited case of White at Lewes, 1856 or 1857, where Justice Wightman, in sentencing the prisoner to transportation for life, said,—"The jury, for what reason I cannot under-"stand, have acquitted you of the offence of murder;" the Judge having summed up that it was murder and nothing but murder; 2542.

The Right Hon. James A. Lawson.

In Ireland juries have a strong feeling against Capital Punishment; 3016.

Lord S. G. Osborne.

There can be no doubt that juries do always try to avoid bringing in a verdict of murder, from reluctance to bring the prisoner to the gallows. They feel the irrevocable nature of the sentence, and are naturally indisposed to be even indirectly a party to it; 3290, 3291.

GEORGE YOUNG, ESQ.

In Scotland there is no difficulty to get juries to convict in cases of murder upon reasonable and fair evidence; 3362. Never found juries to acquit from a dislike to the punishment of death; 3363.

SIR MORDAUNT WELLS.

The capital cases tried in India have correct verdicts returned, though it requires a strong summing up by the Judge to keep the jury clear on the distinction between murder and manslaughter; 3599.

SUMMARY of the EVIDENCE as to the HOME OFFICE.

LORD CRANWORTH.

Thinks that whatever alterations are made in the law there must always be resort to the Crown through Home Office in a variety of cases; 15. It is possible that the present system may be capable of improvement; 38. The Crown ought not to exercise the prerogative of mercy on the ground that there are doubts as to the propriety of the conviction; 49. If subsequent facts come out the Crown should deal with persons as it would be supposed the jury would have done had those facts been before them, and grant a free pardon; 50. Objects to the Secretary of State having power of directing a new trial to be moved for; 71. But if so, every facility for summoning witnesses should be granted free of expense to the prisoner or his friends; 74.

BARON BRAMWELL.

So long as the Queen has the prerogative of pardon there must be appeals. Except that the Home Secretary is always so fit and able a man, the Home Office is the worst Court of Appeal, because it is not a public court; it proceeds on written and ex parte statements, and is an unsatisfactory Court of Appeal from the judgment of a jury; it cannot, however, be got rid of; 229. Appeals to the Home Office are mixed up with considerations of grace as well as of innocence; 232. Supposes that Home Secretaries will always be efficient for the purposes of appeal; 240.

BARON MARTIN.

Thinks it unfair that the Secretary of State should have put upon him perpetually the remission of the punishment of death. Nine-tenths of the community do not understand Home Office practice; 291. Thinks that more discretion should be given to the Judges; 290. The appeal to the Home Secretary as favourable an appeal for the prisoner as can exist; 319.

LORD WENSLEYDALE.

Thinks that there must always be appeals for mercy to the Crown as a last resort; 402. That no change is necessary, as regards the Home Office, in the administration of the criminal law; 403.

RT. HON. S. H. WALPOLE.

Practice at Home Office is shortly as follows:—

Where person found guilty of capital offence to examine the memorial with reference to the case. To consult the Judge who tried the case. To have a report from the Judge of the evidence. To lay before the Judge any new facts which have been brought before the Secretary of State. To request the Judge to report on the new evidence or on the matter generally. These materials being collected, Home Secretary in a position not to rehear, but to advise the Crown whether there are circumstances which would justify either pardon or commutation of punishment; 483. Prerogative of pardon must be vested somewhere, and can be exercised by no one so well as Home Secretary, acting upon his own sole responsibility; 485. Justice perfectly administered at the Home Office, and with an eye to mercy; 486. Great responsibility on Secretary of State; 487. Secretary of State has at command any amount of consultation with Judges, able Under Secretary, and others;

489. Points of law seldom come before Home Secretary; decided by Court of Criminal Appeal; 492. In majority of cases the question submitted for the Home Secretary is, whether there are not circumstances which have not been sufficiently brought before the jury which palliate the matter considerably, and which ought to induce Secretary of State to recommend to the Crown a mitigation of sentence; 491. Not necessary to appoint assessors; Home Office would then become a *Court*, which is objectionable; 500. Much matter brought before Home Secretary which could not come before a Court; 501. Public opinion, as to Home Office, would change if it was looked upon, not as a Court of Appeal, but, as it really is, a Court of Mercy; 502. It may act as a Court of Appeal; 503. And where question is of guilt or innocence it does so act; 504. Not judicially, but to advise the Crown whether the case is sufficiently clear to justify the sentence being carried out; 505. Is confident it must exist, whatever intermediate Court may be established; 507. Secretary of State and Judge who tried the case seldom differ; when they do, Secretary of State takes the responsibility of differing; 508. No settled rule at Home Office that you will not act at variance with Judge after having consulted him; 509. Secretary of State entirely unfettered; 510. Takes all the responsibility of advising the mercy of the Crown to be exercised, but with all the aid he can get; 511. No necessity for publication of proceedings at Home Office; it would then become a Court of Appeal; 512, 513. The only danger is in the Secretary of State erring on the side of leniency; Home Office always follows the recommendation of the Judge as to a mitigation of the sentence; not always in carrying out the sentence; 524. Objects greatly to Lord Ellenborough's scheme, that Secretary of State should be assisted by a Committee of Privy Councillors on ground of great delay; 525. Would give undivided responsibility to Home Secretary for time being; 526. Secretary of State seldom called on to consider the question of guilt; 528. When he is, it is generally upon new facts; 529. All the papers of each case are kept at Home Office; 532. With decision of Home Secretary noted upon them; 533.

Hon. George Denman, Q.C.

Thinks that if Capital Punishment continues the investigation at the Home Office is as satisfactory as any other mode which can be devised; 788.

Sir Fitzroy Kelly.

If Capital Punishment is retained it should be left to the Judge and jury to say if extenuating circumstances exist which ought to save life, unless "*other authorities*" (under which title he does not refer to Secretary of State), but a proper Court should think otherwise; 1044. The jury should merely say, that certain facts proved before them ought to be followed by a remission of Capital Punishment; if the Judge differed, the Lord Chancellor, two Chief Justices, and perhaps Secretary of State, should be consulted as to whether sentence should be carried out; 1045. Poorer classes have great difficulty, from ignorance and want of means, to bring their cases properly before Secretary of State; 1063. Believes many poor persons have actually suffered death from inability to bring their cases properly before Home Secretary; 1065. Thinks that Dr. Smethurst and Kirwan, had they been poor men, and could not have brought their cases before Home Office, would have suffered death; 1074.

Lord Hobart.

Objects to the secret proceedings at the Home Office, which amount, in fact, to a new trial without the ordinary safeguards, such as publicity, for the due administration of justice; 1391. By a commutation of sentence at the Home Office, the deliberate sentence of a Judge, in a legally constituted Court, is, to a certain extent, set aside, which is very objectionable; 1396–1404. Interference by the Home Office with the sentences is an evil inseparable from Capital Punishment; 1398. Objects to Royal prerogative being more frequently exercised in Capital cases than in any other; 1401.

Sir George Grey.

Restoring to the Judge the power of recording sentence of death would remove some of the objections made against the Home Office; 1482. As long as the prerogative of mercy exists there must be some responsible minister to advise the Crown; 1493. If murder classified there would be fewer appeals to the Home Office; 1494. When a memorial is presented to the Home Office, it is invariably sent to the Judge who tried the case, who either answers in writing or comes to the Secretary of State, and, with the assistance of the Under Secretary, the whole matter is discussed; the undivided responsibility of the decision rests with the Secretary of State; 1505. Duty of Secretary of State is to administer the law, not to make it; 1550. Where jury have found a verdict of guilty, and the Judge expresses himself satisfied, Secretary of State should not interfere; 1551. An impression exists abroad that Secretary of State sits as a Court of Review to re-try cases, and set aside verdicts; cases of this kind exceedingly rare, where the facts of the trial are re-opened; in the majority of cases there is no doubt as to the verdict being right, and the question is, whether it is a fit case for the interposition of the prerogative of mercy; no *legal* tribunal could decide that question; whatever tribunal might be established the ultimate decision must always rest with some responsible minister of the Crown; 1552. Secretary of State can always obtain the most able assistance; 1553.

Mr. Justice Willes.

Thinks that there must be some one in whom power should be vested to save the life of a man, even at the last moment, if circumstances appear in his favour to justify it; 2052. The prerogative of mercy must remain with the Crown, and the Crown must intrust its exercise to some functionary; 2053.

Lord S. G. Osborne.

The nation, generally, is more satisfied with the present practice than it is likely to be with any other; would be content to give the Home Secretary, with the Judges, even enlarged discretion to remit or mitigate sentence; 3282–83–88.

Summary of the Evidence upon the Expediency of Altering the present Definition of, and Classifying the Crime of Murder.

On the question as to the expediency of altering the existing definition of the law of murder, &c., the evidence shows great difference of opinion.

Lord Cranworth.

Confessed himself unable to draw any distinction between the different descriptions of murder; 5. And sees no advantage in the distinction of murder into the 1st, 2nd, and 3rd degrees; 16. Thinks the doctrine of the present law with regard to premeditation a right doctrine; 18. Objects to imitating the French law; 19. Is of opinion that the jury might say, "We find there was great provocation," but that it would not be necessary to classify murder; 31, 33.

Baron Bramwell.

Objects to dividing murder into two classes, one deliberate murder without provocation, the other where there may be provocation, but not sufficient to reduce the offence to manslaughter, upon two grounds; 198. First, that whatever multiplies distinctions, diminishes the deterrent power of punishment; 196. Secondly, that the disposition which prompts a man from sudden impulse, without premeditation, to commit a murder requires checking as much as a deliberate disposition to take life; 198. Thinks it might be well to alter the definition of murder as regards malice; 215. That provocation might be admitted in some cases to reduce the offence to manslaughter; 216. And even provoca-

tion by words; 218. Abstains, however, from offering any decided opinion; 223. Difficulty in framing a definition as to what amount of provocation should reduce the offence to manslaughter; 224.

Baron Martin.

Thinks constructive murders should be done away with; that it should not necessarily be murder because A. kills B. while committing a felony; 255. More discretion should be given to the Judges; 255. Premeditated murders should be left by law to be punished capitally; 256. Those caused by provocation by a secondary punishment; 256. In cases where there is no intention to kill at all, but by reason of life being taken in the commission of a felony, which has nothing to do with it, a forced construction is put upon the act, and it should no longer be capital; 257, 263. The intention to do grievous bodily harm, from which death might probably follow, should be the criterion in the definition of murder; 267. Thinks that great evil would arise from a new definition of murder; 272. Discrepancies would arise in the construction put upon it by different Judges; 272. Endeavoured to make a new definition, but failed; 280. Therefore more power should be given to the Judges; 291.

Lord Wensleydale.

Thinks that administering poison with intent to take life should be capital; 356. Lighter cases of murder might be exempted from Capital Punishment, and punishable with transportation or imprisonment for life; really serious attempts to murder, and especially by poisoning, ought to be capital; 357. Murder committed in commission of a felony, when no intention to take life, should no longer be capital; 359, 374. Murder should be divided by law into two classes:—1, where there is intention to take life; 2, where no such intention exists; 367. It should not be left to the jury to say under which class each crime comes; 368. Proposal that a new statute be framed stating under what circumstances punishment should be capital, and when not; 369. Test should be whether there was the intention to take life; 370. Prisoner should be charged in two indictments, or two counts in one indictment; in one with the killing and with the intention to kill; in the other with the killing without the intention; 371. Eventually it must be for the jury to say of which offence he was guilty, but the Judge must see that a proper verdict is found; 372. Great difficulty in drawing the line as to what should be murder of the first and what of the second class in cases of robbery where death ensues; 375. Where intention to take life, and life is seriously injured, it should still be capital; 375. Intention to take life to be inferred from extreme violence; 379. Very difficult to draw up a new Act of Parliament, but thinks it might be done; 380.

Rt. Hon. Spencer H. Walpole.

Differs from so much of Lord Wensleydale's evidence as to intended but unaccomplished murders still remaining capital; 442. The difficulty in proving the intent is greater than in proving the fact from which the intent may be inferred; 448. In cases of death ensuing during the commission of a felonious act, where the felonious act is no longer followed by Capital Punishment, though the life of a person may be taken away without there being an actual intention of taking away that life, the punishment should follow the character of the crime intended; 457. There must be the intent to commit murder to make it capital; 461. Cases where there is intention to commit murder, but under extreme provocation, but not such as under the present law to reduce the offence to manslaughter, should be treated as manslaughter; 462. Question of intent to be left to the jury; 482. The law of murder should be left as it is, except in case of infanticide (*vide infrà*. "Infanticide"); 552. By giving to the Judge discretion to record sentence of death, and representing the facts fully to the Secretary of State, the difficulty of making crimes which are different in their degree of guilt come under the category of murder would be obviated; 537, 538, 539, 540, 553.

Hon. George Denman.

Is of opinion that, however desirable, it is practicably impossible to classify murder without much mischief; juries would violate their duties; the enormous difficulty of classification; cases of lighter iniquity would be included, while those of a greater degree would be excluded; 721. Difficulty in distinguishing between a deliberate murder and one committed under great provocation not so much in the enacting, as in so enacting that the Judge should satisfactorily lay down to the jury, and the jury satisfactorily act on the distinction desired to be drawn; 725. Assuming Capital Punishment to be retained, certain cases now murder might be exempted; 731.

Sir Fitzroy Kelly.

Thinks that assuming the time has not arrived for the abolition of Capital Punishment altogether, the time has come for changing the law so that many cases now capitally dealt with should no longer be so; 1096. Would prefer giving the jury the power of finding extenuating circumstances than attempt to classify offences more minutely than at present; 1102. Giving the jury such power would render classification unnecessary; 1103. If Capital Punishment abolished there must be classification; 1114, 1115.

Right Hon. Sir George Grey.

Is of opinion that if the crime of murder could be classified as it has been in several States of America, it would much facilitate the administration of the law. Uncertainty in administration of the law might be avoided by a division of murder into the first and second degree; 1487. Quotes from Mr. Storer's letter, 1850, as to law in the United States:—"It will be seen that in several of the States homicide is divided "into murder in the first and second degrees and manslaughter. The dis- "tinction between the first two grades, though much refined in practice, "is really this,—the first includes all cases when the malice is *premedi- "tated* and *express*, such as poisoning, antecedent threats, or old grudges, "lying in wait, &c.; the second where malice is implied only; man- "slaughter includes all other grades where the killing is not justifiable "or by misfortune." Thinks this an intelligible distinction. Murders should be classified with reference to the deliberation of the act itself; 1489. The great difficulty in classifying murder would be what degree of premeditation should put the case into the first class; 1629. All unpremeditated murders to be put into the second class; 1629. Cases of sudden provocation, not sufficient now to reduce them to manslaughter, to be placed in the second class; 1630. Where intention to kill accompanied by a felony in first class; 1632. Juries would be judges of facts as to premeditation; 1633.

Henry Avory, Esq.

Most desirable to classify murder if it be possible; failed in framng any satisfactory definition; 1736. Thinks no foreign definition satiis factory; 1742. Those of United States do not define time during which premeditation is to exist; 1744. Every wilful intention to kill from foregone design should be murder of first degree; 1745. The punishment of death being taken away for the intention to kill not followed by the accomplishment of the intention, should not be inflicted upon A. who, intending to kill B., kills C., and so does not accomplish his intention; 1746–1748. Killing an officer of justice in execution of his duty, although there should be no intention to kill, should be murder of the first degree, punishable with death as at present; 1749–1755. Killing a person resisting or interfering to prevent the commission of a felony, involving violence to life or property, such as burglary, should be murder in the first degree; 1756–1758. All other cases, except aiding and abetting suicide (which should no longer be murder), in second degree; 1768. If murder classified into first and second degree, it should be left to jury to say into which class the case fell; 1857. Under direction of the Judge; 1859.

Mr. Fitzjames Stephen.

Objects to a second degree of murder; 2001. Would define *murder*

so as to include the class of cases which ought to be punished with death; 2001. In all other cases the word *manslaughter* should be used; 2250. Change in the definition of murder most important; 2105. Proposes to adopt the definition of murder given in the Indian code; superior to that of American States or of France; 2111 (*vide* Article in Fraser's Magazine, June 1864, p. 753.)

Mr. Justice Willes.

Thinks that a new definition would be a mistake; that it would lead to technical refinements and distinctions at the trial, and that in some cases it would be handing over the question of legal guilt to the jury, which is not desirable; 2042. The law should be left as it is; 2043. With the simple change that Judges should have power to record sentence of death; 2055. Would not by legislation distinguish between the different descriptions of murder; 2045. Great difficulty in framing a definition to meet each case; 2048. Each case stands on its own merits; 2049. Failed in framing a satisfactory definition; 2055. Massachusetts and French definitions objectionable; 2055. Cannot understand distinction as to guilt between express and implied malice; 2070. Generally thinks it inexpedient to introduce any additional classification of offences beyond that which at present exists; 2074. Practical result of any fresh classification would be that guilty people would get off upon distinctions raised on words; 2075. It would take years to settle the meaning of words; 2076. Mere use of new phrases would cause difficulty; 2076. Present law rests upon usage and decided cases; 2079.

Serjeant Parry.

Present definition of crime of murder very unsatisfactory. Malice should be the province of juries; a question of fact instead of at present a presumption of law; 2507. Almost impossible to establish a definition of murder of higher and lesser degree. Rejects any definition which would include case of a man in sudden passion killing another; 2516. Such cases should be manslaughter; 2517. Question of the length of time that the intent has existed should be left to jury; 2534. Whole trial should be left to jury; 2538. Deliberate malice in all cases to be left to jury; 2540, 2541. Malice should not be inferred as a presumption of law from the act; 2542. Objects to present definition of murder, that words do not constitute sufficient provocation for deadly blow; 2552. Great difficulty in any definition which should exclude women from the crime of murder; 2563. If punishment of death retained, some definition, such as that of Massachusetts, should be adopted; 2583-2585.

Sir Lawrence Peel.

Would, if it could be effected, allow of a classification of murder which would confine Capital Punishment to cases of a most deliberate and aggravated description; 2735. Thinks it possible by definition to draw a satisfactory distinction between homicide which should be treated as murder and homicide treated as manslaughter; 2756. Sees no objection to definition of murder in Indian code; 2758. Thinks it no improvement on English law; 2759. If murder classified, all that was not punishable with death should be called manslaughter; 2760. Would state in new enactment,—"After the passing of this Act no offence which "has hitherto been murder shall be deemed to be murder unless it falls "under the following heads," shortly stating them; 2761.

The Attorney-General for Ireland (J. A. Lawson, Esq.)

Thinks there is no possible mode of classifying murder by law if Capital Punishment retained; 2996. Very dangerous to attempt it; 2998. It might be classified if Capital Punishment was abolished; 2997. No line could be drawn between different classes of cases; 2999. And it would increase the uncertainty 3000.

Lord S. G. Osborne.

Whether Capital Punishment be retained or abolished, the possibility of classifying the crime of murder should be considered. It is not clear how this can be effectually done. If the punishment of death is abo-

lished, there should be but one sentence in every case of conviction for murder; but with this, the crime might be made subject to classification thus far;—the jury might have the choice of two verdicts, the one simply guilty of murder, adding, in the case of the other, "with some "extenuating circumstances." The former verdict to carry the extreme penalty, the latter one a penalty not so severe. Assuming that penal servitude for life could be the substitute for Capital Punishment, the latter verdict might secure to the convict some alleviation in the strict penal character of his punishment; 3282. If Capital Punishment is retained, power should be restored to the Judges to "record" sentence of death in the case of the criminal whose guilt should appear to admit of some extenuation. The sentence of death only to be passed when the verdict was simply one of "murder;" the jury not finding anything to extenuate the guilt. With ordinary county juries it would be unwise to expect the intelligence which could deal with a scale which should make many nice definitions of the degrees of guilt; however desirable it may be to have a wider area of classification, the difficulty of obtaining it is so great as to make hope of a satisfactory result very small indeed; 3284. Under any scale a very great deal must be left to the discretion of the presiding Judge and the Secretary for Home Department. The difference between murder and manslaughter depends on the evidence of malice. Malice is a matter in itself admitting of being classed in many different degrees; 3292. The great difficulty which at once arises in any attempt to classify murder is, that its chief element is malice. The action of malice is that of a human passion, of all others, the one (3295) that has the greatest range and the greatest shades of difference in its intensity; 3296. To bring the murders committed into conformity with a scale, denoting the degree of malice which was the exciting cause in each case, would be impossible; 3297.

Sir Mordaunt Wells.

Discretionary power should be given to the Judge to declare whether the case is murder or manslaughter; 3663.

Summary of the Evidence upon Infanticide.

Lord Cranworth.

Infanticide by the mother for the purpose of concealing the birth of her illegitimate child should no longer be murder; 5. Not a crime calculated to create terror in society. Different in its effect and nature from other cases of murder; 6. Murder of legitimate child by the mother should remain capital; 8. Thinks that if an Act of Parliament could be framed so as to take in only the case of a mother murdering her illegitimate child at the instant of parturition, for the purpose of concealing its birth, that case might safely be taken out of the category of murder; 8. Remembers no conviction for infanticide during or immediately after birth; 55. Present punishment for concealment of birth sufficient for infanticide when taken out of the category of murder; 60–63.

Baron Bramwell.

Infanticide by the mother of her illegitimate child, where the jury find that the legal offence of murder has been committed, should be treated like other cases of murder; 135. Thinks it impossible to draw the line as to the time when infanticide should cease to be capital. The remedy for the present state of things should not be in the law, but in the prerogative of pardon; 135. Under the present practice the mother is never found guilty of infanticide; always a possibility of the injury having been inflicted before the child was thoroughly separated from the mother; 138. Two years' imprisonment for concealment of birth practically the only existing punishment for infanticide. When child has been seen alive, present sort of contrivance, by which women are now acquitted, cannot be used; 142.

Baron Martin.

Suggests that an alteration should be made in the law with respect to a child being completely born when injury inflicted; 293. Present state of the law unsatisfactory, there being no means of showing that the wound was inflicted after the child was separated from the mother; 294. Judges can always get an acquittal for infanticide; 294. There should be some intermediate offence between murder and concealment of birth; 295. Making it immaterial whether child completely born or not; 296. Some punishment, short of death, for infanticide in the act of birth; 297.

Lord Wensleydale.

Infanticide in an unsatisfactory state; 334. Never had a conviction; 333. Punishment ought to be more severe than it now is; infanticide, in fact, being now only punishable as concealment of birth; 335. Some punishment short of death would be desirable. Women always escape on failure of proof that child has been born alive; 336.

Rt. Hon. S. H. Walpole.

Thinks it very objectionable that the practice under the law should not run in harmony with the law itself. This not the case at present as to infanticide. Should be made a distinct offence by law, not punishable as murder; 409. Infanticide committed soon after birth should no longer be murder; great difficulty in drawing the line when it should cease to be so; suggests three months after birth; 410. Not to apply to any one but the mother; 411. There should be no difference where child completely severed from the mother and where still attached; 412. Where separate existence, distinction considerable; 413. Condition of mother for a week at least after confinement takes away the character of deliberation; 415. Public opinion would go along with a law taking infanticide out of the category of murder; 420. The mother only and not the father should be exempted from Capital Punishment in case of killing a child of three months or under; 425, 426. Motives upon the mother more powerful; 434. Exemptions from Capital Punishment should only apply to cases of killing illegitimate children; 432. Killing of legitimate should be murder; 433. Quite aware of the great difficulty of drawing the line as to time. Three months quite an arbitrary line, but unable to fix upon a better; 438. The line lies between 14 days as a minimum and three months as a maximum; 453. Where child two or three years old, law should be left as it is, leaving it to mercy of Crown; 454, 455.

Sir Fitzroy Kelly.

Infanticide should be dealt with on distinct grounds, and divided into two classes:—Infanticide of illegitimate, and infanticide of legitimate. Infanticide of illegitimate child upon or shortly after its birth should no longer be capital; 1046. In such cases public opinion and verdicts of juries have for a long time gone against the law, therefore the law should be altered, and such cases no longer capital; 1047. Offence of infanticide of illegitimate child by father or mother should no longer be capital; 1048. Committed within a certain time; 1049, 1046. The guilt of father greater than that of mother, but it would be difficult to draw a distinction in legislation. Would leave it to the Judge to impose respectively an adequate punishment, ranging from penal servitude for life to a short imprisonment; 1050. Quite content to leave infanticide capitally punishable, if power given to juries to find extenuating circumstances, but no power should exist beyond that of jury, which could, notwithstanding such finding, inflict Capital Punishment. If such latter power existed and juries could not find manslaughter, they would acquit altogether, and thus the guilty would escape; 1053. No such thing as a capital conviction or capital sentence executed for infanticide; 1090.

Rt. Hon. Sir George Grey.

Infanticide distinguishable from all other cases of murder, inasmuch as no execution for it has taken place since 1849; 1453. Since 1849 to end of 1864 there have been 39 convictions for wilful murder of children;

34 out of 39 for murder of illegitimate children. Juries therefore not indisposed to convict on clear evidence; where evidence not clear and convincing that child has been born alive, invariably a verdict of concealment of birth. During the period given there has been an average of three cases in each year of verdicts of wilful murder; 1456. Number of offences has remained nearly stationary since 1850; 1458. No perceptible increase in cases for the last 14 years; 1461–1465. No execution since 1849. The law remaining the same, practice has been established that no woman is executed for the murder of an infant; 1466, 1467. Out of the 39 cases almost all the children were under a year, and some newly born; 1469. In cases of newly-born infants juries generally find verdict of concealment of birth; 1471. Judges should have discretion as to punishment for concealment of birth; 1473. Is opposed to the suggestion of taking infanticide of a child of three months old out of the category of murder; 1475. Also opposed to excepting the more limited case of a newly-born child, on the ground that it would be sanctioning by law that it was no great crime to murder a newly-born child; 1476. In France the murder of new-born children made most criminal; 1477, 1470. If a law was passed exempting infanticide of illegitimate children from Capital Punishment within a certain period, it would induce women to commit it within that period, and increase the number of offences; 1479. Law remaining as it is, it can be put in force in the event of a very atrocious case; 1480. The old power of recording sentence of death should be restored to the Judges as to infanticide; 1483. It would be impossible to separate cases of infanticide by any legal definition from what is generally called wilful murder; 1,486. If a division of murder was made, there might be cases in which the circumstances under which a woman takes away the life of a new-born child might be such as to take the crime out of the first degree of murder; 1492. It would be difficult to make it *a distinct offence* to destroy a child either immediately before or after its birth, such definition would be open to objection. If a line be drawn below which infanticide is not to be murder, and beyond which it is, mother would commit the act before the time when it is capital; 1612. Is of opinion that the maximum of punishment (two years' imprisonment) for concealment of birth is not sufficient punishment for the case of infanticide immediately before or after birth; doubts whether any alteration in the law would have any practical effect. Much sympathy always exists for the woman; 1613.

Henry Avory, Esq.

Has seen a growing tendency to acquit in cases of infanticide; 1792. Difficulty of proving separate existence brought more prominently forward; 1797. Where conviction takes place not followed by execution; 1796. Never seen any indisposition to convict where child has been seen alive separated from the mother; 1798. Or where case satisfactorily proved; 1800. Cannot give reason why no one has been executed for infanticide since 1849; 1803. Not from change in law; 1804. Possibly from public opinion; 1805. Would leave the law as it is in a clear case. If, however, the difficulty as to separate existence cannot be got over, would create a new felony,—"That every person who committed violence or injury upon the body of a child before, during, or after its birth, and before the birth was disclosed to some other person, should be guilty of felony;" 1808. Or "Whosoever, under any circumstances not amounting to murder or manslaughter, shall unlawfully inflict any injury or violence upon any child or the dead body of any child before or during its birth, or after its birth, and before the disclosure of its birth to some person other than an offender, shall be guilty of felony;" 1811. Thinks it would not answer the purpose to give the Judge larger discretion as to the punishment for concealment of birth; 1812. Undoubtedly a strong feeling exists against punishment of death being inflicted upon women for infanticide. An indictment for the offence proposed to be created by statute

would meet all cases where doubts existed as to separate existence of child; 1827. Probably some intent should be added to the definition; 1834. The punishment should be in discretion of Judge; penal servitude; 1836.

James Fitzjames Stephen, Esq.

Infanticide one of the crimes in which juries are not willing to carry out the law, because the law as it stands violates the moral sentiments of the country; 2105. Can only remember one case of infanticide being followed by conviction in 11 years' experience on Midland circuit, and that not followed by execution; 2106. Mind of the mother not in a normal state of health. Strongest symptoms of what amounts to temporary insanity. The crime itself less serious than other crimes of murder. Loss to the child cannot be estimated. Creates no alarm in public mind. Strong sympathy with the woman. Special statute should be passed enacting "That any woman who killed her new-born "child, with intent to conceal the birth, should be liable to the severest "secondary punishment, in the discretion of the Judge." Punishment would then be heavier; juries would not violate their consciences. Would remove distinctions as to separate existence. Should be made separate offence by Act of Parliament; 2193. Observations confined to time of birth or immediately afterwards. Would not limit the time very nicely. Indefiniteness in the law better than an encounter with public feeling; 2194. Not to be confined to illegitimate children; 2195. To be made a substantive offence, with power to jury to acquit of the killing and find guilty of concealing; 2196. Punishment, penal servitude for life or shorter, in discretion of Judge; 2197. Only applicable to the mother; 2198. Places no reliance in finding of coroners' juries as to infanticide; 2199. As to definition of infanticide, it should be of a new born child, and the Judges should reduce it to such a degree of definiteness as circumstances rendered it necessary; 2203. Act of Parliament so to be worded as to do away with all such refinements as whether child born alive or not; 2204.

Mr. Justice Willes.

Present law of infanticide in a very bad state. Present law, that an injury inflicted upon a child which has not been actually born into the world, causing death before it has been into the world, even though it has breathed, does not constitute murder; but that an injury inflicted upon a child if it has been completely born alive, causing death after it has been so completely born, even though inflicted before it was so completely born, does constitute murder; 2085. Difficulty as to proof of child been completely born alive; juries always find verdict of concealment; 2086. Law draws a line where child completely separated, and if mother neglects her duty so as to cause death, it would amount to murder or manslaughter; 2090. Proposes a separate Act of Parliament on principle of the Treason Misdemeanor Act; 2091. Power of Judges as to recording sentence of death to be restored in infanticide cases. Acts against procuring miscarriage do not meet the point. Any assault upon a child in course of birth should be a misdemeanor; punishment more than two years; 2092. Enactment proposed would be to meet cases where the child cannot be proved to have been absolutely born or to have had any distinct feeling; 2095. Proposes no change in law where child murder clearly proved; 2098. No distinction between legitimate and illegitimate children; 2101.

Serjeant Parry.

Law of infanticide practically no longer prevails; juries always find concealment of birth; 2559. Great difficulty in drawing any definition of murder which should exclude child murder. Must be done arbitrarily. Would leave the question of infanticide to the jury. Would not retain Capital Punishment under any circumstances for mother murdering her newly-born child. Might be laid down by an Act that a mother should not be guilty of murder for killing a new-born child; but when two or three months old it cannot be excluded from definition of murder; 2562.

THE ATTORNEY-GENERAL FOR IRELAND (RIGHT HON. JAMES LAWSON).

Juries very reluctant to convict of infanticide; generally convict of concealment of birth; 3068. No distinction can be drawn between murder of an infant and murder of an adult. Infanticide generally committed under circumstances of excitement, &c.; may, however, be committed under circumstances of great deliberation, therefore you cannot draw a line; 3070. Does not agree in any distinctions that other witnesses have made between infanticide and murder of adults; 3071. Always a difficulty in determining whether child lived or not; 3072. An offence might be created where, though the woman did not actually conceal the birth, yet she gave birth to a child, and was guilty of violence towards it; 3077. Would make such offence a felonious assault; 3078. And the person not to be acquitted, if it turned out to be murder or manslaughter; 3079.

M. E. CHÉDIEU.

Infanticide in France punishable with death, but it is never applied. Infanticide is the murder of a new-born child, a baby who is not yet registered among the citizens. Its existence is unknown, and the law must protect it. In case of a child some days old, it is no longer infanticide, it is murder or assassination; 3197. Where child not registered for days or some weeks it is still infanticide; but no execution takes place, as jury do not authorize it; 3198, 3199. Jury do not authorize execution in any case of child murder; sometimes changed by the jury to crime of *suppression of state;* sometimes of not having given necessary care; 3200.

LORD S. G. OSBORNE.

Thinks that infanticide should cease to be a capital offence, virtually it is not so now; not only are no real pains ever taken to procure a conviction, but the object of the Court, of all parties concerned, clearly is to reduce the crime to the lesser offence; 3299. Society seems to have partially condoned the offence. Even if Capital Punishment was abolished, it would not be borne that these criminals should suffer the full extent of whatever punishment may be substituted; 3302. The law must be altered, the crime treated as one *sui generis;* at present all sympathy is with the criminal; 3303. And yet how is child murder anything less criminal than other murder, if a child is a human being; 3299. The law should define at what age the taking the life of a human being is to be considered murder, even if we are yet to hold that the murder of a child by its mother is to be less penal as to the sentence than if it is murdered by any one else; 3322.

SIR MORDAUNT WELLS.

Would leave the law of infanticide the same as it now is, with one exception, viz., that power should be given to the jury to find extenuating circumstances; 3646. The Judge should have power to sentence to transportation for life; 3647. Would limit the age of the child to a fortnight or three weeks; 3649. If juries find extenuating circumstances, it should be removed from the category of Capital Punishment, and reduced to culpable homicide, as under Indian Penal Code; 3651. If jury do not find extenuating circumstances, it should be murder; 3652. Infanticide too lightly looked upon in this country; 3653.

SUMMARY of the EVIDENCE as to INSANITY CONSIDERED as a DEFENCE in CAPITAL CASES.

THE RT. HON. LORD CRANWORTH.

Great difficulty arises from the different definitions which are given of insanity; 125. Too much tendency in our law to treat persons as exempt on the ground of insanity, when they ought not to be so treated; 126.

Baron Bramwell.

Thinks the legal definition of insanity quite right; 150. Insanity by law an excuse in two cases;—1. Where the mind is such that it is not aware of the nature and consequences of the act which it is doing, or that it is wrong to do it; 2. Where there is a delusion of such a nature, that if the supposed facts were true the person would be justified in doing the act that caused death. Threats of the law are more necessary upon an insane than upon a sane person; 152. Persons of weak intellect amenable in some degree to threat of remote punishment; 155. Delusion no legal defence, unless such that if the thing were real, it would afford justification for the act committed; 156. Cites instances of persons having delusion on one subject but rational on others. Such persons not to be exempted from punishment; 156–161. Strongly disbelieves in what is called "homicidal mania;" 164. Monomania must be guarded against; 166.

Lord Wensleydale.

Thinks the law as to acquittals on the ground of insanity perfectly clear. There would not be so many acquittals if juries were properly instructed; 360, 361. Is of opinion that the law of insanity was properly defined in the resolutions of the Judges in McNaghten's case; 362.

Hon. G. Denman.

Medical witnesses give startling opinions as to insanity, owing to the existence of Capital Punishment; 793. Conflict between modern medical opinions upon insanity, and the legal definition of it, tends to give greater chances of escape to prisoners, especially in cases of poisoning; 797. Medical definition at variance with legal; 798. Several cases of child-murder in which there have been acquittals on the ground of insanity against the opinion of the Judge; 800.

Mr. William Tallack.

Thinks the abolition of Capital Punishment necessary to prevent collisions between highest legal and medical authorities with regard to insanity. Quotes resolution passed at the meeting of the Association of Medical Officers of Hospitals and Asylums for the Insane, July 14, 1864:—"That so much of the legal test of the mental condition of an "alleged criminal lunatic as renders him a responsible agent, because "he knows the difference between right and wrong, is inconsistent with "the fact well known to every member of this meeting, that the power "of distinguishing between right and wrong exists very frequently "among those who are undoubtedly insane, and is often associated with "dangerous and uncontrollable delusions." Cites the case of James Atkinson, tried at York, Dec. 16, 1858, and acquitted as insane, although he had given formal reasons for the perpetration of the act, and submits that there are cases where in courts men have been recognized as insane who were according to legal definition responsible; 1336. Verdict of jury in above case in teeth of the definition of the law; 1337. Inconvenience of aforesaid difference of opinion would be removed by abolition of Capital Punishment, because it would not be thought an injustice to shut up a person whose insanity was suspected, but it is thought so to take away his life; 1338. Opinion of most eminent medical men that it is hopeless to expect that science will ever clearly distinguish where insanity exists and where not; 1341. Many cases of persons convicted, afterwards found insane; 1342. If Capital Punishment abolished, objection to doctors coming on different sides and giving different opinions would be removed; 1343.

The Rev. John Jessop.

Plea of insanity often caught at by juries. Willing, if they can, to bring in a verdict of not guilty upon the ground of insanity; 2034. Cited case of "Bradish," 1861, acquitted on ground of insanity. Never shown any subsequent symptoms.

Dr. Harrington Tuke.

Much struck when attending trials of murder, where plea of insanity set up, with result of decision of Judges in McNaghten's case; 2391–

2393. Definition of insanity by the Judges in the McNaghten case has led to great error in administration of the law. Witness proposed the resolution cited in Mr. Tallack's evidence (vid. sup. p. 24); 2394. A man may be conscious of right and wrong, still not answerable for his actions; 2396. Insanity must be a positive fact; 2397. No insane man should be responsible to the extent of Capital Punishment; 2398. But might be held so for inferior punishment, on ground of expediency; 2401–2403. Some insane people decidedly restrained by fear of punishment; 2404. Where a man having a delusion on one point, but sane on others, apparently in possession of his full reason, commits murder, he should certainly not be held responsible. Should have the benefit of the doubt of insanity generally; 2410–2421. Man with diseased mind not responsible to the law to extent of Capital Punishment; 2412. In cases of alleged insanity there should first be a trial without reference to the state of mind of the accused; afterwards the question of insanity should be dealt with by persons conversant with the subject; 2416. In present state of law it is impossible these inquiries can be separated; 2420. If Capital Punishment abolished, juries would convict in all cases where insanity set up; 2422. Cites case of Fooks, who preserving appearance of sanity, was tried, convicted, and executed, though really quite insane —on the definition in McNaghten's case, that it could not be said "he "did not know right from wrong;" 2435–2438. Insanity constantly exists with long lucid intervals; 2440. The line between sanity and insanity not being easily definable; 2441. If Capital Punishment abolished, all difficulty as to plea of insanity removed. Prisoner would be shut up for life, which would be the same as imprisonment; 2442. Thinks Townley was of sound mind, and that the medical evidence was a mistake; 2452. Present system of hiring medical men on opposite sides will always cause disagreement of opinion. Judges differ in their summing up; 2455. Considering all the differences, it would be much better to abolish Capital Punishment; 2456. Knowledge of right and wrong generally intact in insane persons, except in cases of utter idiotcy; 2458. French system the best, viz., in sending by the Government medical men to be heard as ordinary witnesses, who are examined by counsel on both sides; this prevents their appearing as advocates on one side or the other; 2466. Medical men might still differ, but a sound opinion would be got. Juries generally find a correct verdict; 2467. Homicidal impulse very rare, but it may happen; 2468. Neither homicide nor suicide imply insanity—a sane man may commit both; 2475. Juries from benevolence often find insanity; 2476. Would not listen to the plea of uncontrollable impulse in a man who was sane. Would require independent evidence of his insanity, except in the case of killing without any possible motive; 2478. In last seven years out of 691 persons tried for murder, 80 were acquitted on ground of insanity; 2480. Experts should be appointed by the Court in cases of alleged lunacy, not as partisans; 2495, 2496.

Dr. Hood.

Has known many cases where insanity, doubtful at first, has afterwards developed itself; 2777. Never known a person executed in whom there was incipient insanity; 2785. Lawyers and doctors must necessarily disagree as to insanity. One deals with facts: the other with symptoms; 2787. Agrees entirely in resolution cited in summary of Mr. Tallack's evidence (vide sup. p. 24); 2791. A man may perfectly know right from wrong, and yet should not be criminally responsible for his actions; 2793. Has known several acquitted or pardoned on ground of insanity, in whom he has failed to discover any symptoms of insanity, either when they came to Bethlehem or subsequently; 2795–2799. The line between sanity and insanity very fine in some cases; 2801. Has not arrived at any new legal definition of insanity; 2803. Believes some Judges hold that there must be some existing delusion on some matter of fact; 2804–2806. When a distinct delusion exists *on any subject*, a man should not be responsible if he commits murder; 2807. Atkinson tried at York 1858, acquitted on ground of insanity on evidence of three medical men, was under witness's care five or six years, and never

showed any sympton of insanity; 2816–17. Some who have been acquitted of murder on ground of insanity, and ordered to be detained during Her Majesty's pleasure, have subsequently been discharged; chiefly in cases of puerperal mania, but in some others; discharge in former cases scarcely justifiable, till woman has ceased child-bearing; 2822–2826. Had cases of men temporarily insane from drink, who have become sane when the drink withdrawn; 2827. No case of a criminal lunatic who has been discharged committing any crime afterwards; 2837. If a man has a delusion on one point, other intellectual faculties may sympathize, and therefore he should be held criminally irresponsible; 2838–2846. If Capital Punishment abolished, there would be much fewer acquitals on the ground of insanity; 2853. Juries would convict and say "If the man is insane it will be found out in gaol, and "then he will be removed;" 2856. The want of capacity to distinguish right from wrong is what is called moral insanity; 2887–2889. As to the responsibility or not of insane people, witness speaks independently of whether the punishment is capital or secondary; 2910. If a person under one delusion committed a theft or burglary, witness would acquit on ground of insanity, and shut him up as an insane person; 2911–2915. When so acquitted, the person is always confined during Her Majesty's pleasure; 2917. Has not been dissatisfied with the conviction in trials for murder where defence of insanity has been overruled; 2920. Has found many persons among convicts who have feigned insanity; 2944.

Attorney General for Ireland.

Great evil arising from Capital Punishment that Judges and juries are disposed to find a person insane who has committed murder. Medical men invent theories and juries catch at them to prevent application of Capital Punishment. Quotes a case; 2978. Result of men being acquitted on ground of insanity when not insane injurious to the community; 2980. Persons so acquitted, sentenced to be confined during Her Majesty's pleasure. After admission into a criminal lunatic asylum they are soon found to be sane. The Crown objects to discharge a man who has committed a grave crime, and the result is that a sane man is shut in a lunatic asylum for life; 2980.

Lord S. G. Osborne.

Thinks that the undisputed difficulty attendant upon obtaining positive evidence of insanity, is in itself an argument against Capital Punishment. The existing definition as laid down by the Judges, would admit of the hanging a lunatic confined as such, who should, knowing it was wrong, kill his keeper. It is a defence which might often be justly made, and yet the evidence in support of it be such as could not be made plain to those who have not studied the subject; 3261. The uncertain, eccentric features of the disease, afford to experts opportunity to give diverse opinions on the same individual case. This causes Judges and juries to undervalue all scientific evidence in the question. We have passed many insane, who in a short time, in prison, would have proved their insanity We have pardoned many as insane, who afterwards have shown no insanity; 3261.

Summary of the Evidence as to the Propriety of giving Power to Jurors to bring in Verdicts of "Guilty of Murder" with "Extenuating Circumstances," in certain cases.

Lord Cranworth.

Thinks it would be very objectionable to give jurors the power of rendering verdicts of "guilty with extenuating circumstances." Thinks that juries often wish to get out of the responsibility of finding a man guilty, when he is to suffer death as the result of their verdict, and that they would almost always say that there were extenuating circumstances. Such verdicts are often given in France, when, to ordinary minds, there

is much to aggravate rather than to extenuate. French juries have this power in other cases besides those which are capital; 23–32.

Baron Bramwell.

Would not give the power to a jury; for where a jury have the option of finding a man guilty of one or the other of two offences they will almost invariably find the minor offence. Would appeal to anyone conversant with the practice of Criminal Courts whether, in one case out of ten, the jury find the greater crime when they can find the less; 191, 192. Thinks the less the jury have to say the better. There would be confusion, disputation, and increased liability to acquit the guilty if the consideration of extenuating circumstances was allowed to be embodied in the verdict; 195–197.

Baron Martin.

Would not give the power to juries, because, if granted, "with extenuating circumstances" would be their general verdict; 265.

Lord Wensleydale.

Does not say that juries always find a man guilty of a lower grade of crime, if permitted, but doubtless there is a natural inclination to do so; 381.

Rt. Hon. S. H. Walpole, M.P.

Is entirely opposed to giving juries the power of a verdict embodying "extenuating circumstances." For he thinks they would always be tempted to find such a verdict without having, and certainly without giving, sufficient reasons for it. If at all permitted, such a verdict should be accompanied by a statement of full and clear reasons for it; 547.

Hon. Geo. Denman, M.P.

Understands that in consequence of the present French system, verdicts of "extenuating circumstances" are constantly brought in, in cases of the most audacious and deliberate murder, where no one believes that there are extenuating circumstances; 722.

Sir Fitzroy Kelly, M.P.

Thinks that, if Capital Punishment be retained, juries should have the power of returning a verdict of guilty "with extenuating circumstances;" 1044. Thinks that in such cases the juries should not accompany their verdicts with the reason for their belief of extenuation, as this would lead to danger, difficulty, inconvenience, and mischief. The Judge might also, if disagreeing with the jury, have the power of qualifying such a verdict subsequently to the Lord Chancellor, the two Chief Justices, and perhaps the Secretary of State; 1045. Thinks that the administration of justice in France is in a state which, we trust, will never prevail here. But the jurors' power there enables them to prevent such inequalities of justice, in capital cases, as sometimes occur in our own country; 1083. Thinks that if juries here had the power of returning verdicts "with extenuating circumstances" it would greatly obviate the need of any classification of murders; for by thus removing the criminal out of the reach of a capital penalty the Judge could inflict such other degree of punishment as he might deem suitable; 1102–1104. Is not prepared to recommend granting such power to juries, except on the supposition that Capital Punishment is to be retained; and if so, in order to prevent the inconveniences experienced in France, a controlling power on such verdicts may also be permitted, which would be rarely exercised by the Judge, subject to approval by a higher tribunal; 1111–1114.

Right Hon. Sir George Grey, Bart, M.P.

Has thought much on the subject of giving jurors the power of returning a verdict of guilty "with extenuating circumstances," in murder cases, and is clearly of opinion that it would be undesirable to do so. The system has led to abuse in France, and if adopted here would be similarly liable to abuse, and would lead to the greatest possible uncertainty in the administration of the law; 1495. If the suggestion which has been made by an eminent authority were adopted, viz., that a jury's

verdict of extenuating circumstances should be controlled by the discretion of the Judge in granting or withholding his subsequent concurrence, this would amount to nothing but what takes place now in a recommendation to mercy. If the Judge approves such recommendation, he reports to the Secretary of State accordingly, and the sentence is generally commuted; 1495. But he would approve of giving to Judges the power of mitigation in certain murder cases; at least in cases of infanticide; 1509.

Mr. H. Avory.

Does not think it would be desirable to give jurors the power to return verdicts "with extenuating circumstances." Forms that opinion chiefly from what he sees going on in France; 1851.

Mr. Justice Willes.

Speaking of what has taken place latterly, much more has been left to the jury in France than he thinks desirable; 2059.

Dr. T. H. Tuke.

Thinks that it would be an improvement of our criminal law to have a verdict of murder with extenuating circumstances, so as to meet such cases as that of Wright, of Southwark, recently executed; 2389.

Mr. Serjeant Parry.

Would leave the whole discrimination as to the degree of a murderer's guilt, to the jury; 2537, 2538. Is satisfied that the public trust more to the verdict of the jury than to the ruling of the Judge; 2548. Believes that English juries would not abuse the power of rendering verdicts "with extenuating circumstances," as the French have done; 2592.

Attorney General for Ireland.

Thinks it would be dangerous to permit jurors to find extenuating circumstances; 3001.

M. Emile Chédieu (of Paris).

States that in France, after a jury has found a man guilty of the worst cases of murder, and without extenuating circumstances, the Sovereign very often commutes the penalty for a secondary one; 3183. There is a distinction between "provocation" and "extenuating circumstances;" 3184. Provocation completely alters the character of the crime, but extenuating circumstances do not alter it. For in the greatest crime, such as parricide, it very often happens that the jury find a man guilty and yet allow extenuating circumstances. It is not extenuating circumstances for the crime itself, but it is circumstances extenuating for the person. For instance, a young man having been suddenly provoked by his father's assaulting his mother, and in a desperate moment striking a fatal blow, when the jury have to answer they say "It is an abominable crime, but yet the scaffold is too much for "that man; we have a right to say that there are extenuating cir- "cumstances"; 3185–6. Has been asked whether the jury might give an answer with motives for extenuating circumstances; the law has not thought so; and for his part, he thinks that it would be impossible; 3186. In France, the power to find extenuating circumstances is not confined to capital, but extends to all criminal, cases; 3189. There used to be in France arbitrary penalties for every crime, at the decision of the Judge (in arbitrio judicis). After the Revolution of 1789, the arbitrary penalties were affixed to respective crimes independently of any modifying judgment left to Judge or jury. Subsequently a discriminating power, that of finding extenuating circumstances, was given to juries, as the preceding arbitrary system was very unjust in many cases; 3189, 3190. The exercise of the droit de grâce, in France, is not the same as in England. In England when a jury has found a person guilty, the Judge of the assizes may give an opinion for the convicted man or against him, and generally the Secretary of State is bound more or less to follow the opinion of the Judge. It is not so in France. When the jury have found extenuating circumstances, this permits a diminution of the

penalty two degrees, by the President of the Court of Assizes, and two councillors. But if there should be no extenuating circumstances found by the jury, and even when the President of the Assizes and the Minister of Justice are against a commutation of the penalty, the Sovereign may abolish the penalty or commute it. He has had an example of this in a capital case, which he related to the Commissioners. In capital cases the Emperor himself examines the procedure in detail; 3200. When the jury find extenuating circumstances, its effect is that the Judge diminishes the capital penalty one or two degrees, at his discretion as to which degree. If in one degree it is hard labour for life, if in two degrees it is hard labour for a time from five to ten years; 3216.

Rev. Lord S. G. Osborne.

Thinks that juries might be trusted with discretion to return a verdict of extenuating circumstances, if some broadly defined degrees of guilt were laid down. But if there are to be nice definitions of the degrees of criminalty, it would be safer to give more discretion to the Judges; 3232.

Sir Mordaunt Wells.

Recommends that juries should have power to find extenuating circumstances in infanticide cases; 3646–48.

Summary of the Evidence upon the Indian Penal Code.

Mr. Fitzjames Stephen.

This witness entered so fully into the subject that it is thought necessary to refer to his evidence at length. That portion of it which more immediately bears upon this subject will be found in the answers 2111 to 2191; reference should also be made to an article in Fraser's Magazine, June 1864, on Capital Punishment, written by this witness.

Sir Lawrence Peel.

Does not think the Indian Code any improvement upon the English law; 2759.

Sir Mordaunt Wells.

The evidence of this witness on this subject will be found in the answers 3602 to 3645 inclusive; 3654 to 3656; 3660 to 3662; 3680 to 3683.

Summary of the Evidence on Restoring to the Judges the Power of Recording Sentence of Death.

Mr. Baron Martin

Was the first witness who touched upon the subject, and thinks that the power of the Judges in ordering sentence of death to be recorded, which was taken away by the Act of 1861, should be restored. Nothing more objectionable than sentencing people to death, when many of the public are fully aware that it will not be carried into execution; 253, 254. Judge should have power to interpose; 255. Sentence of death should not be passed in a formal way, except the Judge *at the time* has the firm determination that, as far as it rests with him, that sentence shall be carried out; 271. As great difficulty exists in making a new definition of murder, the old power of recording sentence of death should be restored; 272. Judge formerly directed sentence of death to be recorded, and what he thought a proper punishment was written down in the associate's book, and Secretary of State always acted upon it; 273, 274. If power restored, it would not interfere with Secretary of State; 282. Witness's remedy to increase discretion of Judge; 290. The present state of things unfair upon Home Secretary. A man is sen-

tenced to be hanged in the most formal way possible, because the Judge has no power to record sentence of death, and the next thing the public hear is that the Secretary of State has commuted the sentence. Public tempted to look on conduct of Secretary of State with suspicion; 291. Particularly desirable that Judges should have power of recording sentence of death in cases of infanticide.

THE RT. HON. S. H. WALPOLE.

Thinks it a great misfortune that the Judges' power of directing sentence of death to be recorded, was taken away by the Consolidation Act, passed in 1861. Judge should have fullest opportunity at the trial of giving weight, *then and there on the spot*, to those special circumstances which have been urged in alleviation of punishment, and which he thinks ought so to operate. At present he is forced to pass sentence when he enters a contrary opinion on the record. Must create a false impression on public mind; 535. Upon the whole it would be better to restore the law to what it was in the 1st Vict., giving power to the Judge to record sentence of death, and then to have the matter brought before the Secretary of State; 537–544. No instance of execution following recording sentence of death; 545. It would give the Judge the power of saying *at the time* when all the circumstances were before him, whether he is of opinion that the extreme sentence of the law should be inflicted or not; 546. Thinks it very objectionable that Judge should pronounce sentence of death when he does not intend it to be carried out. The law and the practice should be uniform; 551. Judge by recording sentence of death would have power to bring all the facts fully before Secretary of State; 553.

THE RT. HON. SIR GEORGE GREY.

Thinks that in cases in which the Judges recommend to the Home Secretary a commutation of the sentence, it would be desirable to give them the power of recording sentence of death, and telling the prisoner *at the time* that it would not be carried into execution. The present law has a bad effect. It throws no real reponsibility on Secretary of State, because the Judge writes to say, that the sentence ought not to be carried out, and it never is. Places Secretary of State before public in the light of interfering with the administration of justice, by setting aside a solemn sentence. Judge should be relieved from passing sentence of death in such cases, and should either pass some other sentence or direct sentence of death to be recorded, and communicate with Home Secretary; 1482. The above remarks chiefly apply to infanticide, but there are other cases of murder where the Judge might have this discretion; 1483. When he felt quite clear that the sentence ought not to be carried into effect; 1509. Question divides itself into parts. 1. Whether discretion should be vested in the Judge in the first instance, as to passing the sentence of death or of passing a less sentence. 2. Whether he should merely record sentence of death, leaving the ultimate decision with Secretary of State; 1511. In cases of infanticide, Judge should have the power of *at once* awarding a less punishment than Capital Punishment; far preferable to his passing sentence of death, and privately recommending a mitigation of it. There might be other cases so clear that he would not pass sentence of death, but doubts whether he should have power in all cases to pass *at once* a less sentence; 1512.

HENRY AVORY, ESQ.

Extremely desirable that Judge should have power to record sentence of death instead of pronouncing it; 1844. When Judge does not intend it to be carried out; 1845. Reduces solemn ceremony to a form; 1846. Judge should have power in all cases to record sentence of death; 1847. The law should be restored to what it was before 1861; 1848. If murder classified would still allow Judge to record sentence of death in murders of first degree; 1849.

MR. JUSTICE WILLES.

Thinks that in all cases where under the peculiar circumstances the Judge is of opinion that sentence ought not to be, and would not be with reference to the exercise of the mercy of the Crown, in case he

should pass such sentence, carried into execution, he should be at liberty to record sentence of death instead of passing it, and to inform the Home Secretary what he thinks is the sentence which should be substituted - a recommendation which would always be acted upon; 2043. At pre; sent it is a great scandal that Judge should be compelled to pronounce a sentence which he knows ought not to be and will not be carried into execution; 2044. Practice shows that a man cannot be hanged upon judgment of death recorded; 2051.

ATTORNEY GENERAL for IRELAND.

Sees no advantage in recording sentence of death. No sentence should be recorded unless intended to be carried out; 3049. Sentence should be pronounced in case of murder; 3052. If a person is found guilty of murder Judge should pass sentence of death, leaving it to the Executive afterwards to decide upon the representation of the Judge whether the sentence should be carried out; 3053.

LORD S. J. OSBORNE.

Thinks that power should be given to the presiding Judge to exercise his discretion, in recording the capital sentence, where, in his opinion, it is clear that the case is one in which the criminal should not be executed; 3282.

GEORGE YOUNG, ESQ.

In Scotland the Judge has no power to record sentence of death; 3047

SUMMARY of the EVIDENCE as to ALLOWING APPEALS in CAPITAL CASES.

LORD CRANWORTH.

Adheres to his answer given to a "Select Committee of the House of "Lords in 1848, on the further amendment of the Administration of the "Criminal Law," and thinks that there should be no Court of Appeal in criminal cases; 128.

MR. BARON BRAMWELL.

No Court of Appeal could exist without augmenting uncertainty, and worrying prosecutors; if a Court of Appeal existed there must be a public prosecutor; great increase of expense; no advantage would be gained from a Court of Appeal, which would compensate for the disadvantages attendant upon it; 229. Can suggest nothing in the way of changing the existing system as to revisal of sentences; 234. One of the great objections in the present law is that if new evidence is discovered the only way of giving the prisoner the benefit of it is not to try him over again, but to pardon him; no such great mischief, however, arises from this, which would make it desirable to establish a regular Court of Appeal with its attendant disadvantages; 235.

MR. BARON MARTIN.

Thinks there should be no established Court of Appeal in criminal cases on the facts; there must be an ultimate appeal to the Home Secretary if there were a dozen Courts of Appeal; 315 321.

LORD WENSLEYDALE.

Thinks that there should be no new trial in criminal cases on facts; that the law as it at present stands is quite right; 395, 396. The poor would be placed in an inferior condition to the rich; 397. If appeals were allowed they should be both on behalf of the Crown and the prisoner; 398. Never tried a case of murder in which a new trial could have been properly granted; 399. Whatever number of Courts of Appeal might be established, there must always be the final resort to the Home Office; 403.

RT. HON. S. H. WALPOLE.

There should be no Court of Appeal on the facts in capital cases, as a matter of right, on the following grounds:—

i. Parties would be still as free to petition the Home Office to alter the punishment, and the objections which are now raised against the

exercise of the prerogative by the Home Office, viz., that the Home Secretary is rehearing alone what has been determined by the Judge and jury, would be ten times aggravated, because he would then be rehearing what had been determined by the Court of Appeal, and by the Judge who had decided the case in the Court below;

ii. It would be an appeal for the rich and not for the poor;

iii. If an appeal was admitted on the part of the criminal it must also be admitted on the part of prosecutor; society could not be properly protected if appeals were granted as a matter of right; 485.

Much matter is brought before the Secretary of State which could not be brought before a regular Court of Appeal; 502.

Hon. Geo. Denman.

Is strongly of opinion, that if Capital Punishment must be retained there should be no new trial, but that the present system of application to the Home Office should be continued: new trial would be of such advantage to the rich, to the apparent detriment of the poor, that it would become a scandal; 784. His opinion against new trials is as strong as his opinion against Capital Punishment; 787.

Sir Fitzroy Kelly.

Thinks that if an efficient Court of Criminal Appeal was established the cases in which innocent men are convicted and punished would be greatly diminished; 1101.

Sir George Grey.

Whatever Court of Appeal may be established there must be an ultimate appeal to the Home Secretary; no decision of any Court of Law could be so final as to exclude such appeal; 1552.

Lord S. G. Osborne.

Thinks no Court of Appeal would be more satisfactory than the present system.

George Young, Esq.

There is no new trial in criminal cases in Scotland; 3419. No Appellate Court on the facts; 3420.

Summary of the Evidence as to whether Executions should be Public or Private.

Lord Cranworth.

Thinks there are some advantages in public executions (as being impressive), but that their disadvantages more than counterbalance the former. Therefore thinks executions in private would be preferable in the present state of society; 82, 83. Thinks that the newspaper reports of such executions would produce the requisite amount of publicity; 84. And a coroner's inquest on the body of the criminal would be a proper precaution; 86. Thinks the Danish plan a good one; viz., that all convicted felons should witness the execution; 90.

Baron Bramwell.

Suggests that executions should be neither absolutely public nor actually private, but with only a certain amount of publicity; 179.

Baron Martin.

Is for public executions. Thinks such scenes as those at Müller's execution would only occur in London; 302.

Lord Wensleydale.

Recommends private executions; 383. Such should be witnessed by regularly appointed persons, who should also be required to sign a document affirming the execution, to be then published conspicuously; 384, 385. And the representatives of the press might also be present; 393.

Right Hon. S. H. Walpole, M.P.

Recommends private executions. Considers public ones demoralizing, brutalizing, and the reverse of deterrent; 554–557. A coroner's inquest

should be held after a private execution. The press should be admitted, also the relatives of the deceased or their representatives; 559, 560.

Hon. Geo. Denman, M.P.

Thinks that any secresy or mystery in the treatment of condemned criminals would invest them with a new sort of interest, even greater than such have at present; 743.

Col. Henderson.

Considers that private executions, followed by a coroner's jury, would be much better than public ones. The verdict of a coroner's jury satisfies the public mind in cases of death by accident, and would be similarly effectual to verify death by law. Private executions, followed by a coroner's inquest on the body, have been found to result advantageously in Australia; 847. A spectator of a public execution told him that the first sight of the convict on the scaffold made him rather sick; but that the actual execution was rather pleasant and satisfactory than otherwise; 849. Thinks private executions more deterrent. Believes a public execution destroys the whole value of an execution; 854. Prisoners should certainly not witness private executions. Has found that flogging criminals in public had not half the effect produced by flogging them in private. The spectacle causes a sympathy, which destroys the feeling wanted; 856–859.

Inspector Kittle.

Does not think that witnessing an execution excites any fear; 876. The lower classes regard it as they would a prize fight, or similar exhibition; 877. Horsemonger Lane executions are more orderly than those at the Old Bailey; 883–889. Never heard any expression of compassion towards the criminal, not even at Wright's execution; 891–894. At the recent execution of the five pirates at Newgate he heard two costermongers conversing on it. One said, "So help me God, Bill, "aint it fine; five of them, and all darkies." The other replied, "It is "so, and I should like to act Jack Ketch to them ———." There is a great deal of obscene language and jesting at executions, but not at the precise time that the execution is going on; 960–964. Very few women attend, and they are of the lowest class; 965.

Rev. John Davis, Ordinary of Newgate.

Thinks private executions would be preferable to public ones, on some grounds. Is not certain that public ones are not the best, but would like to have private ones made trial of; 1222–1226. The execution of the five pirates did not feel so shocking to the Newgate officials as the execution of a single man; 1230. We have curtains now at executions at Newgate; 1259.

Mr. Wm. Tallack.

Read a letter from Professor Upham of Maine, stating that the public sentiment in that State is strongly in favour of private executions rather than public ones. But any executions at all are extremely rare in Maine; 1285. Also, read a letter from Mr. Lafayette, of Montreal Gaol, Canada, stating that the executions there are in public; 1290.

Sir G. Grey, Bart.

Thinks there is a growing feeling in favour of executions within prison precincts. Thinks that as this plan works well in Australia, it would do so here also; 1635. Representatives of the press should attend. Does not think that either the privacy or the publicity of executions affects their deterrence upon the criminal class; 1636. Crowded assemblies of the worst class attend executions in the provinces as well as those in London; but especially the latter. The present Sheriffs of London have altered the day of execution from Monday to Wednesday; 1637. Thinks the precautions taken in Australia and America, as to verifying the occurrence of executions in private, would be sufficient and satisfactory in this country; 1640, 1641.

H. N. Nissen, Esq. (Ex-Sheriff of London.)

If executions are to be continued they had better be in the prison yard. Calcraft's manner is very rough, just as if he were hanging a

dog; 1658, 1659. Thinks the spectacle of an execution creates a feeling of total indifference to hanging; 1664. Would admit the public to witness executions in the prison yard, or such of them as chose to come at say 4 o'clock in the morning; 1695–1697.

Mr. H. Avory.

Thinks executions should be conducted with solemnity within prison walls, attended by the acquaintances of the deceased and others, followed by a coroner's inquest, and the testimony of the same to be duly advertized, together with the names of the persons present; 1927.

Prof. L. Levi.

Thinks that even the publication of the details of private executions (as well as public ones) would be demoralizing; 1973, 1974.

Justice Willes.

Has formed no decided opinion as to whether private executions are preferable to public ones; 2102.

Rev. John Jessop (of Horsemonger Lane Gaol).

When prisoners in gaol hear of an execution going on they remark "Well so and so is going to be hanged; I wish I were outside, I "would go in for a good swag"; or "On the last occasion I got a "tremendous lot of purses, I only wish I were outside now"; 2294.

Mr. Thos. Beggs.

Believes that private executions would not do away with the objectionable effect of public ones. Believes that the worst consequences follow the detailed publication of all the acts, words, and circumstances of the criminal. Thinks private executions would excite a still greater curiosity as to such subjects by throwing an air of mystery around the criminal; 2345, 2346. Thinks that private executions would increase the morbid sympathy and interest felt towards a condemned criminal; 2347, 2348. Private executions might also give rise to surmises on the part of the most ignorant and suspicious of the population that the sentence had not been fairly carried out, or perhaps not inflicted at all; 2663. Thinks that suspicions would become current that rich persons could somehow escape executions in case of public executions being abandoned; 2366.

Serjeant Parry.

If executions are to be continued, thinks those in private less objectionable than public ones; 2626 to 2632.

Captain Cartwright (of Gloucester Gaol).

Thinks publicly-inflicted death a most cruel thing. Private executions solemnly conducted would be less objectionable; 2658.

Attorney General for Ireland.

If executions are to continue thinks private ones would be more solemn. The sheriff, gaoler, chaplain, and gaol officials should be present and the friends of the deceased admitted to see the body; 3003 to 3013–15. Does not think a coroner's jury would be requisite; 3008. Does not believe that the Irish people would doubt the carrying out of executions if conducted in private; 3014.

M. Emile Chédieu.

In France (and Italy) executions are conducted in public. In France such occasions are orderly. The executions are not pre-announced and take place early in the morning, but in a public spot. The newspapers give publicity to all the circumstances. If capital punishment is to be continued, thinks that in France publicity is preferable, for in considering the various revolutions and public troubles there, should such excitements again occur, there would be no security for human life if the authorities could execute in private; 3201. Yet public executions should be abolished; their deterrent effect is very questionable. If the criminal is a male, the tendency is, to keep up in him a state of reckless hardihood. In the case of the female, the dread of so public an exposure to a ribald crowd, has a depressing, deadening effect, which is most cruel. The conduct of the crowd looking on, proves that the scene fails of any wholesome impression, whilst at the same time it gratifies

a debasing taste for the horrible. The details of a public execution are altogether inconsistent with that degree of solemn action which should accompany the law's most awful penalty; 3309. Private executions might be conducted in a way less cruel to the criminals, and indirectly having far more effect upon the masses, interested in executions.

Solicitor General for Scotland.

Is not aware whether there would be, in Scotland, a preference for private executions, or not; 3426.

Col. Stace.

Resigned his appointment of Governor of Oxford Gaol, partly from his abhorrence of executions, more particularly of public ones; 3434.

Summary of the Evidence as to what Secondary Punishment should be inflicted in the event of the Abolition of the Punishment of Death.

Baron Bramwell.

Cannot imagine any secondary punishment more certain of infliction that the capital penalty; 201. Thinks penal servitude as at present administered is scarcely a punishment at all; 202. And that there would always be some ground for hoping for the commutation of sentences of life imprisonment; 204. Does not feel satisfied with the reported experience of secondary punishments in America and elsewhere; 205, 206.

Baron Martin.

Thinks equal certainty would attend the infliction of penal servitude for life as with the capital penalty; 307. Thinks that what answers well as a secondary punishment in America would succeed equally in this country, but that Swiss experience is no rule for us, by reason of the dissimilarity of national character; 309.

Lord Wensleydale.

Thinks that a certain description of secondary punishment (namely, torture, maiming, &c.), would be more efficacious and deterrent than the capital penalty, but that public opinion would not tolerate the infliction of such; 330. Still thinks, as formerly, that no transportation or imprisonment can be so unalterably and efficiently enforced as to be an equal punishment with the death penalty; 332. Alluded to Mr. Justice Coltman's opinion, that absoutely certain life imprisonment might be substituted for death. He (Lord Wensleydale) considers that such absolute certainty and permanence could not be carried into effect; 346.

Hon. Geo. Denman, M.P.

Entertains no theory as to a new punishment as a substitute; but, inasmuch as many criminals as bad as Palmer, or even as Rush, have been acquitted, he thinks any punishment whatever that would separate such from society must be better than that they should be acquitted and so enabled to commit more murders. Many whom the world generally believes to be atrocious murderers are at present not executed, but are visited with some secondary punishment. Cannot see that it would be difficult to substitute a similar punishment for the few cases now capitally punishable, for they would be a small proportion compared with the number found guilty of death, but commuted of late years; 746, 747. In the worst murders, the punishment ought to be imprisonment for life; 751, 752. Supposing Capital Punishment were to be abolished, then in cases now visited with penal servitude for life, Mr. Denman would in certain instances recommend a less term, but at the discretion of the Judge rather than of the jury; 758. In case of a murderer imprisoned for life, and subsequently killing his warder, Mr. Denman would impose more stringent restraint, as chains or even a cage, if

necessary. Would, from the first entrance on imprisonment afford such prisoners fewer opportunities of murdering their warders than are now open to transported criminals; 762–777. As to the particular kind of substitute, considers it should be some sort of life imprisonment; 778. In the practical adoption of this secondary punishment at the present time for many of our murderers we do not hear of their murdering their keepers or others; 780.

Col. Henderson.

Thinks men absolutely imprisoned for life would have to be treated like wild beasts, and with such severity as would produce insanity or desperation; 831, 834, 835. Thinks it would take a century to convince the criminal classes that life-long sentences would be permanently enforced; 833. There would be no impossibility in providing for the safe custody of murderers by a separate prison; 836. It is questionable whether you can add dark cells and similar aggravations as a further punishment to one imprisoned for life; 839. Thinks that by locking a man up with severe restrictions for 20 or 30 years you do not render him more prepared to die than by two or three weeks preparation; 840. It would be very difficult to afford any mitigation to a prisoner confined for life; 841. Fears that, if all hope is shut out, all efforts at reformation would be vain; 842.

Mr. Thomas Kittle.

Thinks that convicts, if confined for life, would say, "I am better off "than I was when at liberty;" 950. Because some such persons when liberated after long detention are found to commit crimes again within a few hours of their liberation; 953.

Mr. Richard Tanner.

Thinks some men would not mind life-imprisonment much; 991, 1030. Yet all wish to escape from penal servitude for life; 994. Believes that if murder was only visited with penal servitude for life, desperate criminals would, in consequence, murder the police who attempted to apprehend them; 999–1002, 1031. But thinks that if murder involved life imprisonment, and burglary only 15 years, then a criminal committing the latter crime would be deterred from attempting to murder his apprehender; 1003. Does not think that criminals believe in penal servitude without a hope of remission; 1032.

Sir Fitzroy Kelly, M.P.

Recommends for the worst murderers, as a secondary substitute, life-long transportation or imprisonment, with every degree of hardship, short of cruelty, and without hope of change or mitigation; 1040, 1041, 1042. Thinks it would be reasonable to reject, systematically, all applications made by the relatives of such murderers to obtain a mitigation of sentence; 1043. Has heard from very high authority that the substitution of secondary for capital punishment in some of the principal States of America has worked well, and has led to a decrease rather than an increase of crime; 1098, 1099. Admits that very great difficulties would attend the enforcement of life-long imprisonment, but thinks it better for this to be the case than that one innocent man out of a hundred condemned persons should suffer death; 1105, 1106. Would attempt to prevent a life-imprisoned convict from murdering his warder by not allowing him the use of arms, tools, &c., if dangerous, and by similar safeguards; 1142–1147.

Rev. John Davis.

Thinks you cannot keep desperate criminals in perpetual imprisonment without some greater deterrent. Thinks he once read in a Government Report that a man had been 29 times tried for murder in Australia after successive imprisonments; 1173. Believes there was a man in Millbank Prison who actually took up a water-closet, or something like it, and knocked a man's brains out with it; 1191. Desperate criminals feel sure that penal servitude for life will be mitigated. If they really believed it permanent they would dread it very much, though not so much as death; 1213–1215.

MR. WM. TALLACK.

Handed in documents recently written by the Governor of Rhode Island, the Governor of Wisconsin, and the Governor of Michigan, showing the satisfactory experience of those countries in respect of the adoption of secondary punishments in lieu of death. A similar testimony from Professor Upham, of Maine; 1285. A similar favourable testimony from Canton Freiburg; 1304. Similar experiences in Nassau, Oldenburg, Belgium, and other countries; 1311–1318. (For other details, *see* Appendix.) Mr. Tallack thinks that if secondary punishments (as a substitute for the capital penalty) work well in America, they may be expected to be still more efficacious in this country by reason of our greater influence of law and order; 1297–1299. Recommends, for murderers, absolutely permanent detention, but not necessarily accompanied by the utmost possible severity of treatment, nor without some consideration as to the nature of the particular circumstances of the crime; 1339, 1360, 1361.

LORD HOBART.

Recommends, as a substitute, the infliction of the highest secondary penalty now imposed, and rendered still more severe, if consistent with the recognized rules of humanity. Is not prepared to propose the special details of such a punishment; 1382–1388. Thinks some temporary aggravation of the treatment of a life-confined criminal should be the punishment for murdering a warder; 1427–1430.

H. N. NISSEN, ESQ., (Ex-Sheriff of London.)

Does not consider it possible to inflict a punishment commensurate with the crime of murder without calling forth sympathy for the criminal after two or three years of such very severe punishment as working in chains or in water; 1691, 1692. But such might not be the result of continued imprisonment with labour suitable to the criminal's bodily powers; 1693–1695.

LEONE LEVI, PROFESSOR.

Approves of permanent secondary punishment because it affords a chance of reformation, and also provides a sufficient security to society against further outrage from the criminal; 1953–1956.

J. F. STEPHEN, ESQ.

Is not convinced that the experiences of Tuscany are a rule for this country, nor is he certain as to what those experiences really are; 1989, 1990.

REV. JOHN JESSOP.

It is possible to carry out perpetual imprisonment, because it is already done in the case of lunatic criminals (of homicidal tendencies and otherwise) at Bethlehem and Broadmoor. And although these are not separated from others so confined, no warder has been killed by them, neither have they killed one another; 2271. Recommends that murderers of the worst description should be treated as the inmates of Broadmoor now are. The latter have no hope of release nor the slightest prospect of any mitigation of their sentence; 2272. Thinks no sane murderers would be so dangerous in confinement as the Broadmoor lunatic ones, because the former would only attempt murder with some particular object, whereas the latter are disposed to murder any person, and without the spur of a definite object; 2274, 2283–2293. Would suggest, for murderers so confined, the same discipline as that of convicts in penal servitude, or even a more severe one; 2280, 2282. Thinks it would be perfectly practicable to maintain discipline with criminals confined for life; 2308. Does not think prisoners so confined would be very likely to murder their warders, but a little extra precaution might be necessary; 2323, 2327–2330.

MR. THOS. BEGGS.

Remembers that the presumed difficulty of finding a satisfactory substitute for Capital Punishment was brought forward, successively, as an objection to the efforts of Romilly, Buxton, and Peel for removing the death punishment from forgery and other crimes of a greater or less

degree ; ameliorations long since carried into effect ; 2367. Thinks that if 450 insane murderers (the most dangerous class of any) can be safely and permanently confined at Broadmoor, as is the case, that the number of 10 or 12 murderers now annually executed would not produce insuperable difficulties if permanent confinement were extended to them also ; 2367–2375. Believes the precautions now taken to prevent the murder of warders in places of permanent detention are, in the main, successful ; 2373–2376. From conversation, he has had with medical men, thinks sane murderers in confinement would be more manageable than insane ones are at present ; 2377.

Dr. T. H. Tuke.

Thinks that the punishment of a sane man confined for life as a criminal lunatic is worse than being hanged ; 2481. And such a punishment would probably render him insane ; 2482, 2483–2485. At Dartmoor and Portland convicts are kept at public works without injury to their reason ; but permanent imprisonment would so injure convicts in many cases, though not in all. At Pentonville, one year is the maximum of silent solitary confinement ; 2486–2492.

Serjeant Parry.

Recommends imprisonment for life in a prison expressly appropriated for murderers only ; 2611–2615. Would have these prisoners kept apart from one another ; 2616, 2617. States that there has been no difficulty in discovering suitable secondary punishments for offences formerly capital, but now no longer so ; 2618. Quotes Miss Martineau's account of her visit to a man who had been confined (with labour at some trade) for 15 or 16 years in a solitary cell in Philadelphia, for wife murder. Her account of the conversation most interesting ; 2622, 2623.

Captain Cartwright, Governor of Gloucester Gaol.

Thinks that criminals dread perpetual imprisonment more than death. They have told him so themselves ; 2662–2664, 2672, 2675. Has had the management of prisoners undergoing imprisonment for life, and does not believe that the terror of death would enable them to be controlled better ; 2706. It would undoubtedly be very difficult to govern Anglo-Saxon prisoners, detained for life without hope of liberty, but it would be practicable. It would require management of a high character, and the religious sentiment to be much cultivated ; 2706–2707. Believes that murderers confined for life could be so managed as not to murder their warders ; 2708–2711. Believes that by industrial training, and by religious influences, murderers permanently detained might be awakened to a new life, and not rendered savage by their confinement ; 2711–2713. Would inflict a severe flogging for assaults upon warders by life imprisoned convicts. Has known flogging to produce a good effect instantaneously in a similar case ; 2714–2716. Permanent confinement for murderers should be by a special Act of Parliament, rendering it absolutely final and irremissible. The present system of life-sentences is not regarded as irremissible ; 2718–2720.

Dr. W. C. Hood.

His experience at Bethlehem and Colney Hatch lunatic asylums has not shown that very long confinement tends to produce insanity in criminals acquitted on the ground of insanity, but who have turned out to be sane ; 2849, 2850. Recommends that criminals sentenced to life-long detention be occupied in useful pursuits, agricultural labour or trade work, so as to keep their minds in a healthy condition ; 2851, 2857, 2858. He would have such prisoners kept in a certain amount of association, but not large association ; 2860. Confinement at Broadmoor is not penal, but is permanent, absolutely so with lunatic murderers ; 2880–2885, 2924–2926. Convicts sent from penal settlements to an asylum such as Broadmoor are pleased with the change ; 2941–2943. Has known cases of assaults upon warders both by sane and insane criminals ; 2947–2949.

Mr. Attorney General for Ireland.

Thinks murderers should be imprisoned for life in a prison by themselves, and with separate cells ; 2962.

Mr. Wm. Morrish, Governor of Portland Prison.

Very long imprisonment has a depressing effect on health and mind; 3113. The spirits of those so imprisoned usually become more depressed because generally they are not so criminal as the majority of prisoners. A higher diet has been recommended for such life prisoners than for others confined for less periods; 3121–3126. Does not think he has had any case of suicide among the life men; 3127. All the life men at present retain some hope, and with reason, for some have had their sentences commuted; 3128–3131. If such were deprived of all hope, their minds might become affected, and they would become dangerous to deal with; 3176–3179, 3133, 3134. There have been many assaults made upon warders at Dartmoor, but not more by long-sentenced men than by short-sentenced ones; 3135, 3136. As Deputy Governor of Dartmoor, he has received many prisoners after two years, solitary silent confinement at Pentonville and Wakefield. They were idiotic. This system has been ameliorated, and with good effect; 3145–3148. Has not visited the American or Swiss prisons to see the secondary treatment of murderers; 3153, 3154. Thinks life imprisonment could not be carried out except on the separate plan, and that this would injure the mind; 3149. As a general rule the life men do not give so much trouble as the habitual criminals; 3167.

Lord S. G. Osborne.

Recommends penal servitude for life in a prison constructed for the purpose; in the details of its management, it should be so adapted as to seclude the prisoners from all communication whatever outside its walls; dealing with them as they may be classed, to suffer more or less from strict penal discipline; 3232. The sentence to be irrevocable, except under very exceptional circumstances. The power to remit or alleviate in any case, to be with the Secretary for the Home Department. The deterrent effect of penal servitude for life can hardly be disputed; there are those who hold it to be a sentence so severe as to destroy reason, and yet sentences of death are now commuted to it. To a man advanced in years, a sentence of penal servitude for 15 years can scarcely be anything to him but one for life; 3322. The painful effect on all the relatives of the convict, who know they can hear nothing of or from him, whether he may be well or ill, or suffering more or less, would in itself keep up a deterring force on the whole community.

Col. Stace, late Governor of Oxford Gaol.

Thinks there would be no other alternative for Capital Punishment but perpetual imprisonment rigidly enforced. This it would be practicable to carry out. Would not place murderers apart as a class from other prisoners. The confinement should not be solitary; 3462–3484.

Sir Walter Crofton.

Thinks that a due consideration as to retaining or abolishing Capital Punishment entirely depends upon our having, in our secondary punishments, an effective substitute provided; 3519. Does not believe that penal servitude for life, if carried out in the present convict establishments of either England or Ireland, would by any means prove an effective substitute for Capital Punishment; 3520. Because it would require special prisons and a special discipline for life sentences as an effective substitute for Capital Punishment; 3521. Does not think it would be practicable to confine life-imprisoned convicts in the same prison with others subjected to a less sentence; 3522. But he thinks it would be practicable to carry out the life sentence, as a substitute for Capital Punishment, in prisons to be built specially for that purpose; 3523. Thinks that it would be possible to establish such a system of discipline as to manage prisoners confined for life without hope of remission in a special prison for murderers only; but thinks the needful discipline would be perfectly impossible if those prisoners were mixed up with other prisoners. In Ireland he has had under his notice men who have endured confinement for periods of from 10 to 15 years, without detriment to their health, even in establishments not suited to their detention for life;

3524. In this country it has not been the habit to keep convicts for 15 years but to send them to the colonies; 3525. Those detained in Ireland for long periods are employed on Spike Island in associated labour during the day, and are confined in separate cells at night; 3527–3531. Has known prisoners in Ireland kept for 16 months in separate confinement without association; 3535. Agrees with the statement of Colonel Henderson, that at present all the men in our convict prisons feel that there is a time when they may look forward to release, and so are never without some hope; 3547, 3548. In the prison which he would propose for men detained for their lives he would have a special portion of it for those who have had their death sentences commuted, and would increase their severity and distinguish between them and the ordinary life-sentence prisoners. It should be known, as far as possible, that the former were dead to the world; 3551. Is not in a position to lay down any particular characteristics for the prison which he suggests. But in Belgium they are in the habit of keeping at least 300 to 400 prisoners who are sentenced for life, and they keep those men 20 and 25 years, and in some cases for life; they retain the punishment of death, but very generally and nearly always commute that sentence to a life sentence, and there are now an accumulation of some 400 life-sentence men in that prison; 3552. Has seen persons who have thoroughly inspected the prison at Ghent in Belgium, and they report that these men are kept in very fair order, and there is no reason whatever why they should not be detained for their lives, as far as he can observe; 3553. Suggests that a thoroughly minute examination should be made of some of these cases where they have been kept in prison for very long periods of time, because at present in this country we have no evidence to go upon. The longest case that we have is that of a man who has been detained 15 years and 8 months in prison. It is now imperative upon us to have some satisfactory system of life confinement, because now we are not to send any more prisoners to Western Australia, and it is laid down that in many cases they may have to be kept for their lives; 3553. Sir Joshua Jebb's convict system in England was meant for an intermediate system, and never contemplated keeping these men for life. Practically, if you have life men mixed up with the others, they have become so accustomed to see stimulants given in the way of tickets-of-leave and other inducements for progress, that they, not having anything of the sort, would be likely to be very troublesome; whereas if they were in a special prison by themselves, where they would not be surrounded by those kind of stimulants, they would magnify every little thing which you did for them, so that you would be able to preserve hope by taking them from a very hard and distasteful labour and leading them gradually to industrial employment. Prisoners think it a very great privilege to get into industrial labour from hard manual labour; 3554. For, in the total exclusion of more important interests from their minds these trifles acquire a great importance to them. Has had experience with very refractory men. More violent men than he had it is impossible to find, but he has had no instance of a murdered officer. Believes that arrangements could be made with regard to such men so as to prevent the lives of the officers being in jeopardy. Is quite sure that with a continuous and severe discipline, without cruelty, they would find it to their interest to work in a proper way. He has had to resort to chains with such, for a time; 3555. At Munich, and other places, prisoners work with heavy chains, and then with light ones, and so on from stage to stage; 3556. Does not apprehend any insuperable difficulty from the abolition of Capital Punishment in managing convicts under life sentences. Greater precautions than at present would have to be taken, but he is certain that the difficulty can be overcome; 3557–3559. He cannot go so far as to abolish the punishment of death at once, but apprehends that after the adoption of such a system of life-confinement as he has described, it would be viewed by the public as a fair substitute for very frequent commutation, and that the death punishment might ultimately be done away with altogether. And he would take, as an example, other countries which have practically done away with the death punishment,

still retaining the power; 3561. Would advocate the retaining the power to execute the perpetrator of a bad murder, even though the sentence should not be actually carried out; 3562, 3563. Thus practically he would abolish Capital Punishment, substituting for it these prisons and such discipline as he has stated, if they were found to answer; 3665. Thinks that the element of hope may be maintained within prisons, although the inmates may be dead as to the world and continued in the prison all their lives, or in some place of detention in connexion with that prison; 3568, 3569. He would not have such prisoners ever allowed to leave this prison, or to be returned to the world in any way; 3571. If a man can be kept in health of body and mind for 15 years, there does not seem to be any reason why he should not be kept in health for 25 or 30 years. He asked Captain Whitty, as he had been watching these men, what he thought of keeping men for their lives, and he said, "I see no reason why men should not be kept for their lives." But after 15 or 16 years, or some such period, he thinks there might be some modification of the system by the men being removed from prison labour to agricultural labour; 3574. Life-sentenced men would escape if they had an opportunity; but they would find it very difficult to escape from Spike Island. With regard to the punishment, he is satisfied that there is nothing to lead to the conclusion that the men could not be kept still longer; 3576.

M. Visschers (of Brussels).

Perpetual imprisonment with hard labour is a substitute for Capital Punishment in Belgium; 3586. The present system is not yet in a proper state of working; 3587. Almost all prisoners condemned for life (in Belgium) die in confinement; but in many instances, and even in the case of murder, the punishment has been gradually commuted to 20 years, and later only to 12 or 15 years' imprisonment. The separate system has only recently been introduced into the Ghent prison as a general system. The new Belgian prisons are being built with provision for the adoption of the system of separating life prisoners from the other prisoners; 3591.

REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We Your Majesty's Commissioners appointed "to inquire into "the provisions and operation of the laws now in force in the "United Kingdom, under and by virtue of which the punishment "of death may be inflicted upon persons convicted of certain crimes, "and also into the manner in which capital sentences are carried "into execution; and to certify to Your Majesty under our "hands and seals, or under the hands and seals of any five or "more of us, our several proceedings in the premises, and at "the same time to report to Your Majesty our opinion whether "any and what alteration is desirable in such laws or any of "them, or in the manner in which such sentences are carried into "execution," humbly report as follows:—

1. We have been occupied a considerable time in taking evidence upon the questions referred to us.

Many witnesses have been examined, and a careful summary of their evidence precedes this Report.

In addition to this oral testimony, certain questions have been addressed to, and answers received from, nearly all the nations of Europe, and some of the states of the United States of America, with regard to the laws relating to the punishment of death existing in those countries respectively.

The opinions of all Her Majesty's Judges in England, Ireland, and Scotland, as well as of other eminent criminal lawyers, have been requested upon the expediency of making any alteration in the laws under which the punishment of death may now be inflicted upon persons convicted of certain crimes.

In answer to this request some of the Judges have sent in statements of their views, while others have attended before the Commission and verbally stated their opinions. The whole of the evidence, both oral and documentary, will be found in the Appendix.

2. The Commissioners forbear to enter into the abstract question of the expediency of abolishing or maintaining Capital Punishment, on which subject differences of opinion exist among them, but they are all of opinion that certain alterations ought to be made in the existing law.

3. The only crimes now practically punishable with death in the United Kingdom are treason and murder; we say *practically*, because in Scotland there remain many other offences which are

still in point of law liable to be so punished, though in fact such a case never occurs. We strongly recommend that this anomaly be no longer allowed to exist, and that all such obsolete laws be repealed.

A list of these offences will be found in the Appendix, p. 605.

4. We have then, first, to consider whether, assuming Capital Punishment to be retained, we should recommend any change in its present application to the crime of treason, and upon this point we have come to the conclusion that no alteration is required. The Statute of the 11 & 12 Vict. c. 12., commonly called the "Treason Felony Act," without in any way abrogating the ancient law upon that subject, has introduced a new and more merciful law, which, in all but cases of extreme gravity, will probably supersede the former. The maximum punishment under this Act is penal servitude for life, which seems sufficiently severe in cases of constructive treason unaccompanied by overt acts of rebellion, assassination, or other violence. With respect to treason of the latter character, we are of opinion that the extreme penalty must remain.

5. We now arrive at the consideration of the crime of murder and its punishment, and in treating this difficult question we think it convenient briefly to refer in the first instance to the existing state of the law.

6. By the law, murder is the *unlawfully* killing another with *malice aforethought*, and this definition appears to us to be correct in principle.

Unfortunately these words have not been confined to *express malice aforethought*, or as it is sometimes called *malice in fact*, but have received a less natural construction, which has long been adopted as the settled law of the land. It has been held that *malice* in its legal sense imports nothing more than a wicked intention to do injury to the person of another without any just cause or excuse, and that where a man is killed in consequence of any such wicked intention, the law will infer *malice aforethought*, though no express enmity or preconceived design can be shown; not indeed a *particular*, but a *general malice aforethought*, arising from the extreme depravity of disposition shown by the act. This doctrine of implied *malice aforethought* goes even beyond this, and is carried to such an extent, that the law always infers it when a person in the act of committing a felony, even of a trifling nature, kills another, though there may be in fact no premeditation, and no intention to kill, or do serious injury.

When homicide is committed in the perpetration of crimes of great enormity, such as those enumerated in Clause 12, this inference may be not improperly drawn.

7. The extreme severity of this construction has been somewhat mitigated by the law of manslaughter, which is defined to be the unlawful killing of another *without malice, express or implied.* In order to reduce the crime from murder to manslaughter, the law allows evidence of provocation to be given to rebut the inference of malice, which would otherwise be drawn from the act of

killing. Here, however, again certain arbitrary rules have been introduced into the law, which most materially restrict its beneficial operation. It has been established by the decisions of our courts, that no provocation by words, looks, or gestures, however contemptuous and insulting, nor by any trespass merely against lands or goods, is sufficient to free the party killing from the guilt of murder, if he kills with a deadly weapon, or in any manner showing an intention to kill, or do grievous bodily harm. In these cases, though the suddenness of the provocation may rebut in point of fact the *express malice aforethought*, it is not allowed, on account of its supposed insignificance, to overcome the *general malice aforethought*, which is implied by the *law*, from the wickedness and cruelty of the deed. Without entering into the many nice and subtle distinctions which prevail upon this subject, it is enough to say that the practical result of this state of things is most unsatisfactory. A man who, in a sudden fit of passion, aroused by insult to himself or his wife, kills the person who offers the insult, is, by law, guilty of the same crime, and liable to the same punishment as the assassin, who has long meditated and brooded over his crime. A great majority of the witnesses, whom we have examined, have expressed a strong opinion that this branch of our criminal law requires revision and amendment, at least so far as the punishment is concerned, and we have unanimously arrived at the same conclusion.

8. We proceed, therefore, to offer such recommendations as we think expedient for altering the present law of murder. It appears to us that there are two modes in which the change may be effected.

9. The first plan is to abrogate altogether the existing law of murder, and to substitute a new definition of that crime; confining it to felonious homicides of great enormity, and leaving all those which are of a less heinous description in the category of manslaughter.

10. The other plan is one which has been extensively acted upon in the United States of America, where the common law of England is in force; this leaves the definition of murder, and the distinction between that crime and manslaughter untouched, but divides the crime of murder into two classes or degrees, solely with the view of confining the punishment of death to the first or higher degree.

11. We have given both these plans our serious consideration, and we are of opinion that the required change may be best effected by the latter, which involves no disturbance of the present distinction between murder and manslaughter, which does not make it necessary to remodel the statutes relating to attempt to murder, and does not interfere with the operation of those treaties with foreign powers which provide for the extradition of fugitives accused of that crime. The object proposed can be attained by a short and simple enactment, providing that no murder shall be punished with death except such as are particularly therein mentioned.

These should be called murders of the first degree; all other murders should be called murders of the second degree, and punished as herein-after recommended.

12. We recommend therefore:—

(1.) That the punishment of death be retained for all murders deliberately committed with express malice aforethought, such malice to be found as a fact by the jury.

(2.) That the punishment of death be also retained for all murders committed in, or with a view to, the perpetration, or escape after the perpetration, or attempt at perpetration of any of the following felonies:—Murder, arson, rape, burglary, robbery, or piracy.

(3). That in all other cases of murder the punishment be penal servitude for life, or for any period not less than seven years, at the discretion of the court.

13. Our attention has been called to the frequent failures of justice in cases of infanticide.

The crime of infanticide, as distinguished from murder in general, is not known to the English law. The moment a child is born alive, it is as much under the protection of the law as an adult.

14. We have considered whether the failure of justice, which undoubtedly often occurs in such cases, may not be obviated by some change in the law which shall add to the protection of new-born children. The principal obstacle which now prevents the due enforcement of the law is the extreme difficulty of giving positive proof that the child alleged to have been murdered was completely born alive.

15. We have given this important and difficult subject our serious attention, and we have arrived at the opinion, that an Act should be passed making it an offence, punishable with penal servitude or imprisonment at the discretion of the court, unlawfully and maliciously to inflict grievous bodily harm or serious injury upon a child during its birth, or within seven days afterwards, in case such child has subsequently died. No proof that the child was completely born alive should be required. With respect to the offence of concealment of birth, we think that no person should be liable to be convicted of such offence upon an indictment for murder, but should be tried upon a separate indictment. The accused should not be entitled to be acquitted in either of the above cases if it should be proved on the trial that the offence amounted to murder or manslaughter.

16. There is one point upon which the witnesses whom we have examined are almost unanimous, viz., that the power of directing sentence of death to be recorded should be restored to the judges. We think this change desirable.

17. Upon another important point there is also a great preponderance of opinion against the present state of the law. The witnesses whom we have examined are, with very few exceptions, in favour of the abolition of the present system of public executions, and it seems impossible to resist such a weight of authority. We therefore recommend that an Act be passed

putting an end to public executions, and directing that sentences of death shall be carried out within the precincts of the prison, under such regulations as may be considered necessary to prevent abuse, and satisfy the public that the law has been complied with.

18. There are other questions of great importance upon which we have taken evidence, viz.,—

(1.) The propriety of allowing an appeal on matters of fact to a Court of Law in criminal cases.

(2.) The mode in which the Crown is advised to exercise the prerogative of mercy by the Home Secretary.

(3.) The present state of the Law as to the nature and degree of insanity which is held to relieve the accused from penal responsibility in criminal cases.

It is obvious that these difficult questions are not confined to capital crimes only, but pervade the whole administration of the Criminal Law. They therefore require a more general and comprehensive treatment than the terms of the Commission under which we act will admit. We think, therefore, that while we should not be justified in making any recommendation to Your Majesty on any of these points, we should fail in our duty did we not humbly solicit Your Majesty's attention to them as requiring further investigation.

All which we humbly submit to Your Majesty's Royal consideration.

RICHMOND. (L.S.)
STANLEY. (L.S.)
STEPHEN LUSHINGTON. (L.S.)
JOHN TAYLOR COLERIDGE. (L.S.)
THOMAS O'HAGAN. (L.S.)
J. MONCRIEFF. (L.S.)
H. WADDINGTON. (L.S.)
JOHN BRIGHT. (L.S.)
WM. EWART. (L.S.)
GATHORNE HARDY. (L.S.)
GEORGE WARD HUNT. (L.S.)
CHARLES NEATE. (L.S.)

8th January 1866.

DECLARATION moved by MR. WILLIAM EWART.

The undersigned, Members of Your Majesty's Commission, are of opinion that Capital Punishment might, safely, and with advantage to the community, be at once abolished.

STEPHEN LUSHINGTON.
JOHN BRIGHT.
CHARLES NEATE.
WILLIAM EWART.

8th January 1866.

The Right Hon. Mr. Justice O'Hagan's Opinion.

I am of opinion,—with much deference for the great authority of those who think otherwise,—that the weight of evidence and reason is in favour of the abolition of Capital Punishment.

I should, therefore, sign the declaration prepared by Mr. Ewart, but that I doubt whether public opinion in this country is yet ripe for the acceptance of such a change; and if it should be accomplished, without the sufficient sanction of that opinion, I fear the reaction which might follow on the perpetration of some great crime. I think, also, that the substitution of a minor penalty would render essential serious modifications in the discipline and machinery of our prisons; and such modifications, whilst I believe them to be possible, may be difficult, and remain to be devised. On these grounds, having regard to the practical scope of Your Majesty's Commission, I cannot join in simply advising immediate abolition; but, so far qualifying my adhesion to the terms of the declaration, I am prepared to adopt the principle which it embodies.

8th January 1866. THOMAS O'HAGAN.

Declaration moved by the Lord Advocate.

The undersigned, Members of Your Majesty's Commission, are not prepared to agree to the Resolution respecting private executions.

STEPHEN LUSHINGTON.
WM. EWART.
CHARLES NEATE.
J. MONCRIEFF.

8th January 1866. JOHN BRIGHT.

MINUTES OF EVIDENCE.

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MINUTES OF EVIDENCE

TAKEN BEFORE

THE COMMISSIONERS

APPOINTED TO INQUIRE INTO

The Provisions and Operation of the Laws now in force in the United Kingdom, under and by virtue of which the Punishment of Death may be inflicted upon Persons convicted of certain Crimes,

AND ALSO INTO

The Manner in which Capital Sentences are carried into Execution.

Tuesday, 29th November 1864.

PRESENT :

THE DUKE OF RICHMOND.
MR. ATTORNEY-GENERAL FOR IRELAND, M.P.
HORATIO WADDINGTON, ESQ.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Right Hon. LORD CRANWORTH examined.

Lord Cranworth.

29 Nov. 1864.

1. (*Chairman.*) Your Lordship has had considerable judicial experience?—I was a Baron of the Court of Exchequer for 11 years, and consequently had a good deal of experience in criminal trials.

2. Will you be kind enough to favour the Commission with your views generally upon Capital Punishment?—My views decidedly are, that it would be impossible to dispense with it in cases of murder. Nobody can tell, till the experiment has been tried, whether an inferior punishment might or might not be sufficiently deterring; but my belief is, that it would not be. Murder is a crime so much beyond all other ordinary crimes, that I think society is justified in restraining, and is bound to restrain, as far as it can, its commission by the most deterring punishment, and I have no doubt whatever that the fear of death is infinitely more deterring than the fear of any other punishment is, or could be made to be. Therefore my opinion is, that, inasmuch as murder is a crime which requires the most deterring punishment, and as death is the most deterring punishment, it would be unsafe to do away with it as the means, as far as human foresight can provide of preventing the commission of that crime. I think that it

Lord Cranworth.

29 Nov. 1864.

is extremely important that there should be a general opinion prevailing amongst the criminal class that whatever guilt they are incurring by crimes of violence, they should have a motive to take care that human life does not fall a sacrifice. I do not mean that when a person is committing a crime he actually enters into a reasoning with himself upon the subject, but I believe that the criminal class generally are imbued with the notion that if death ensues from the crimes in which they are engaged, they will be hanged, but that if it does not ensue they will not be hanged. I believe that that is a most salutary feeling to operate on their minds. And on that subject I have been much struck with one of the Returns from foreign countries with which the Commission have been good enough to favour me. I observe that in the return from Italy, the person who makes the return says, "Civilization has diminished sanguinary crimes rather than "the diminution of punishments." That, I understand, was in answer to the question, whether it was his opinion that the diminution of punishments had or had not had the effect of diminishing crimes. He says "Civilization has diminished sanguinary crimes rather than "the diminution of punishments. Yet the abrogation of the punish-"ment of death for robbery by open force, when unaccompanied "by homicide, has much diminished the number of the homicides that "were committed before that abrogation. The reason of this is, that "he who committed the crime, knowing the punishment that awaited "him, had every reason to put to death the person whom he had "attacked for the purpose of robbing him in order to destroy the "evidence of the crime." To that I entirely subscribe.

3. (*Mr. Waddington.*) There has been the same change in the English law. Is your Lordship aware whether the same effect has been observed? For instance, burglary with violence was formerly capital, though death did not ensue, it is now not capital unless death ensues. Are you aware whether the same observation has been made?—No, I cannot speak upon that point. That alteration has been made since I was concerned in administering the criminal law, and, therefore, I cannot pretend to give any opinion upon it. But I think that in the nature of things it must be so.

4. The same observation would apply to highway robbery?—Certainly, it would apply to all crimes of violence, all crimes in which the criminal knows that in the prosecution of the crime if pushed to the utmost, death may very likely ensue.

5. (*Chairman.*) Would your Lordship draw any distinction between the different descriptions of the crime (if I may so say) of murder?—I do not feel that I am able to do that. There are, perhaps, some few cases which are now murder which might safely be made not to be murder; there is only one which now presents itself to my mind, but there may be others. I allude to infanticide committed by a mother for the purpose of concealing the birth of her child. It would be necessary to guard very strictly any such exception, because it ought to be confined to cases of death caused at or about the time of parturition. When a woman giving birth to a natural child murders it in order to conceal the birth, it may be reasonable that that should not be treated as murder. Practically it never is so treated, because juries always find that they cannot be certain that the child was born alive, but only that the mother wanted to conceal its birth. I incline to think that in conformity with what is the common feeling such a case ought not to be treated as a case of murder.

6. (*Mr. Hunt.*) Upon what ground would you make a distinction between that case and the case of any other murder?—I think that

it does not occasion the same terror to society. I should hardly say that any one is murdered; it is rather as if the child never came into the world, than that, having come into it, it is murdered. It is not a sort of crime calculated to create alarm in society.

7. (*Mr. Ewart.*) Does your Lordship take into consideration the motive which impels the criminal to crime, and that the motive in the case of infanticide is of a different kind?—I do not think that in such cases the motive of the criminal would of itself be a safe ground to proceed upon. That would not be the main principle upon which I should proceed; it would be upon the ground that it is a crime which, for the reasons I have already stated, is altogether different in its effect and in its nature from an ordinary case of murder.

8. (*Mr. Waddington.*) Would it not be extremely difficult to frame an Act of Parliament to carry out that view. Other species of infanticide may be mentioned, as, for instance, where a legitimate child is killed for the purpose of preventing its succession to an estate. Your Lordship would hardly include that case?—Certainly not; I feel bound to say that I have turned over in my mind whether any of these restrictions could be made, and the only case which has occurred to me as possible would be the case of infanticide. I do not pretend to say that I have considered the subject sufficiently to state that an Act of Parliament could be framed, but if it could be framed so as to take in only the case of a mother murdering her child at the instant of parturition, for the purpose of concealing its birth, I think that that case might be safely taken out of the category of murder.

9. (*Mr. Hunt.*) Your Lordship would limit it to the case of the mother?—Certainly.

10. Supposing that the midwife intentionally destroyed the child in the act of birth, how would you draw a distinction between her case and that of the mother?—I must repeat that I am not at all prepared to say that even in the case of the mother such a distinction can be made, or that it is possible to frame a law which shall meet the case to which I allude, and shall meet no other case; if it could be framed I think that it might safely be done. But the case of a midwife intentionally killing the child would be that of a mere stranger. It would in my opinion be the same thing as an ordinary murder.

11. (*Mr. Waddington.*) Are you aware that a modification has been introduced in Holland to this extent, that they have repealed the Capital Punishment for the first murder of an illegitimate child by its mother (confining it to an illegitimate child), but that if the offence is committed a second time it becomes a capital offence?—I was not aware of that.

12. (*Mr. Attorney-General for Ireland.*) Would you not draw a distinction in the case referred to by Mr. Hunt. Would you not say that there was an immense distinction between the act, when committed by the mother, in a peculiar state of health, and when deliberately done by the midwife?—I do not see any distinction between the case of the midwife and of any third person.

13. (*Mr. Hunt.*) I thought that your Lordship considered that destroying a child just coming into the world was a different thing from destroying a child who had lived a certain time, and I instanced the midwife as the person who is most likely to be present at the birth?—That is one distinction, but not sufficient to take the case out of the category of murder save in the case of the mother.

14. Supposing that the father was anxious to get rid of his offspring, and instructed the person in attendance to put it to death at the moment of birth, how would you distinguish that case from the case of

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the mother doing it herself?—I think that ought to be treated as murder. The mother has influences operating on her which cannot affect any other person; she is hardly conscious of her acts, hardly a responsible agent. I do not pretend to say that the distinction which I have suggested is altogether satisfactory to my mind. I instance it as the only case in which I have been able to suggest that there might be a modification.

15. (*Mr. Waddington.*) What do you say to the case of a murder committed upon the sudden impulse of an extremely violent passion, produced by an altercation by words, under circumstances which would not reduce the offence to manslaughter. For instance, suppose that a jealous husband has a violent quarrel with his wife, and that in the course of the quarrel she taunts him with her affection for another man, and he kills her upon the spot; do you think that that ought to be punished in the same way as a deliberate murder by poison, or in any other mode, which has been preconceived and meditated upon before the act?—I cannot say that I have sufficiently considered such a case, to be able to give an answer which would be satisfactory to my mind. I rather believe that, I should say, that it must be left to the discretion of the Crown being exercised. I observe that in these returns from foreign countries, although there have been great attempts to define what circumstances are to make homicide amount to murder, you will still find that a large proportion of the persons convicted of murder are after all pardoned, or are not punished capitally; and I believe that whatever alterations are made in the law, whatever qualifications are annexed to it, the resort to the Crown must be made in a variety of cases.

16. I am now speaking of the period before you come to the Crown, whether there might not be, as your Lordship is aware have been adopted in America, two classes of murder—murder which is punishable capitally, and murder which is punishable with penal servitude for life, including deliberate acts of premeditated murder, and murders committed in the actual perpetration of a certain series of felonies to be named. Have you considered that question?—I cannot say that I feel the advantage of these distinctions of murder in the first degree, murder in the second degree, and murder in the third degree. I think that they are refinements which it must be very difficult to act upon.

17. The great difficulty is from the question of premeditation, is it not—what length of premeditation is required?—I observe that in Massachusetts they say that half a minute (I interpret that to mean any time, however short) of determination amounts to premeditation. What then does the distinction amount to? Nothing at all, in my opinion. I think that whenever any person is committing an act of violence which he knows may probably result in death, and he nevertheless prosecutes that violence, and it does result in death, that must be considered a premeditated murder.

18. That is the doctrine of the English law at present?—Yes, and I must confess, without, I hope, any undue prejudice in favour of it, that it is in my opinion a right doctrine. There appears to me to be a great error in many of these returns, in which they say that robbery, if ending in death, is punishable with death. I think that in such cases the real distinction is that the crime amounts to murder, and so that the murder not the robbery is punishable with death.

19. Are you aware that murder in the French law, which is the foundation of most of these laws, is only capital in certain cases, and not, as in England, capital in all cases, but is only capital when it amounts to assassination, or when it accompanies certain other crimes,

which are mentioned in the code. I understand your Lordship to say that you would not approve of introducing such a distinction into the English law ?—I do not see any corresponding advantage in it.

20. (*Mr. Attorney-General for Ireland.*) Is there not a considerable disadvantage in having capital sentences pronounced which everybody knows will not be carried out ?—Certainly.

21. Is it not very important to have a classification which would enable a Judge only to pronounce a capital sentence when he believed that the capital sentence would be executed ?—I think that that would be one advantage which would result from it; but we have to deal with a balance of advantage and disadvantage. I was not aware that the power to order sentence of death to be recorded had been done away with.

22. (*Mr. Neate.*) I understand your Lordship to think that if the law remains as it is without any greater alteration as to infanticide, there will probably be a great many cases in which the mercy of the Crown will be exercised ?—Certainly ; and I cannot imagine any state of the law in which that will not be the case.

23. Has your Lordship considered whether some of the onus might not be thrown upon the jury, and whether some of the discretion, which is now left to the Crown, might not be left to the jury, as it is in some other cases ?—I think that that would be very objectionable. I think that juries often wish to get out of the responsibility of finding a man guilty when he is to suffer death as the result of their verdict, and that they would almost always say that there were extenuating circumstances. One must have observed that in trials in France, the jury often find extenuating circumstances when to ordinary minds there is much to aggravate rather than extenuate.

24. I have not been able to find that there is any definite law in France, though French lawyers will tell you there is, but might it not be possible to define the discretion of the jury in that matter, and to specify, for example, the ground of extreme provocation. Might it not be better to leave it to the jury, who have all the facts before them, than to leave the case to be tried over again by the Secretary of State ?—I do not think that my view would lead to the case being tried over again by the Secretary of State.

25. Not the fact, but the sentence ?—It is a matter upon which you are as able to form an opinion as I am, and I do not know that the circumstance of my having been engaged for some years in administering, amongst other laws, the criminal law, enables me to form a better judgment than other persons, but I confess that I should think it a dangerous power to trust to the jury.

26. (*Chairman.*) Has your Lordship looked at the return from France, which gives an enormous number of capital punishments mitigated by extenuating circumstances as compared with the sentences of death absolutely executed ?—I have looked at it.

27. I understand your Lordship to say, that having looked at it, you would not be inclined to give the power to the jury of finding extenuating circumstances ?—Certainly not.

28. (*Mr. Waddington.*) Your Lordship is aware that the French juries have that power in all cases, not merely in capital cases, but that it runs through the whole law ?—Yes.

29. And that they exercise it to a very large extent indeed ?—Yes.

30. (*Mr. Attorney-General for Ireland.*) They are not required to specify the circumstances or to find any facts, but they simply give an opinion ?—Yes.

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31. Do you think that it would increase the advantage (if it be an advantage) if it were made requisite that they should find facts?—I think that it would be much better that the jury should say "We find "that there was great provocation." If it were defined by law beforehand I think that it would be much better than the loose way of saying, "There are extenuating circumstances."

32. (*Mr. Ewart.*) Is your Lordship aware that it has been recommended by writers upon criminal law in France, that the jury should not only say that there are extenuating circumstances, but should specify what those extenuating circumstances are?—I was not aware of that.

33. (*Mr. Hardy.*) Would it not then be necessary to define what was murder in the first or second degree, if you had facts to find?—I have already said that I think it would not suit our law to say, "murder in the first degree," "murder in the second degree," and "murder in the third degree." The jury now practically do recommend to mercy upon the ground of great provocation, or from whatever causes they may think proper to make that recommendation, which of course is always conveyed to the Crown, but it still rests with the Crown to act upon it or not.

34. (*Mr. Ewart.*) Is it not one of the greatest objections which are made to the existing system that a resort to the Crown is allowed so extensively in this country?—I do not believe that there is any country in which it is not resorted to to the same extent. I am not prepared to say positively to the same extent, but it occurred to me upon looking at some of the returns that in some countries it was to a larger extent.

35. Have not the frequent applications to the Crown been a ground of complaint against the present system?—I think that they have been a ground of complaint, but I must own that I do not think them a well founded ground of complaint; because I do not think that any system can be imagined in which the party convicted should not have the right of petitioning for a remission or a mitigation of punishment. I do not believe that by any system you can prevent applications to the Crown. There must be such an ultimate appeal somewhere.

36. You prefer the present system to a new system of a court of appeal?—What court of appeal do you propose?

37. I merely allude to the general principle of appealing to some tribunal instead of appealing to the Crown.—I never saw any case which I thought at all possible in the shape of an appeal from the facts. What is to become of the witnesses? Are they all to disperse? and are they to be summoned again? And why is a second trial more likely to be right than the first? My reason for not answering the question at first was that I did not know whether you meant an appeal in point of law: that there is already.

38. Then your Lordship would not recommend any change in the present system with regard to the Home Office; you would leave the same discretion as there is at present?—I should leave the ultimate discretion to the Crown. As to whether the present system may be perfect or not, I do not at all pretend to say; very likely it may be capable of improvement.

39. (*Mr. Attorney-General for Ireland.*) Is there no case which occurs to your Lordship in which a new trial might be allowed with safety?—It does not occur to me that there can be any, but if it was proposed I would give it my best consideration. I never heard any suggested.

40. Supposing that there was the discovery of new evidence after the verdict, would your Lordship say that the matter should be left as

it is to the discretion of the Crown acting upon the new evidence, or that there should be an appeal to a new jury in a case of that sort ?—Do you mean to have the trial entirely over again ?

41. I should say that that would of course be necessary ?—I think that it would be an impossibility.

42. (*Mr. Waddington.*) As long as the prerogative of mercy exists in the Crown is it possible in any case to prevent an appeal to it ?—It is impossible.

43. Supposing that there were two trials, and that a man was convicted twice, there would be just the same motive for applying to the Crown after his second conviction, as after his first ?—Certainly.

44. Have you the slightest doubt that he would exercise his right ?—Certainly not.

45. (*Chairman.*) And you could not deprive him of it ?—Certainly not, and it would be very wrong that you should. If it is right that the Crown should have the prerogative of mercy, it ought to be easy for a criminal or his friends to apply for its exercise.

46. (*Mr. Waddington.*) Is it possible in exercising the prerogative of mercy entirely to exclude the question of doubt as to the prisoner's guilt, an appeal being made to the mercy of the Crown ; and it being frequently put forward as a ground of mercy, that the guilt is not satisfactorily proved, should your Lordship conceive that the advisers of the Crown would be justified in entirely rejecting that consideration? —Logically there is but one result; if the prisoner has been sufficiently convicted, the question of somebody having a doubt is immaterial.

47. I am not speaking of somebody having a doubt, but I suggest that the Crown or its advisers, upon full consideration of the evidence, and of further facts which are produced, ought to entertain a doubt. Do you conceive that the advisers of the Crown would be justified in saying "We will not enter into that matter in any case. We will "entirely abide by the verdict, and it is a pure question of mercy "without any question as to justice or the correctness of the verdict." Do you think that such a principle could be maintained ?—I do not know that I have sufficiently considered that question to be able to answer it with entire satisfaction to my own mind. I remember one or two cases in which I thought that the Home Office exercised a very wrong discretion on that very ground ; they said, "We do not think "that it is quite clear." Then I thought that they ought to have let the prisoner off, because, if he had been convicted upon grounds as to which there was doubt whether there was evidence sufficient to convict him, and that doubt was sufficient to justify the interposition of the Crown, it does not appear to me that that is a ground for imprisoning the man for life, but it is rather a ground for releasing him.

48. You think, then, that the prerogative of mercy ought never to be exercised on the ground that there is doubt as to the propriety of the conviction ?—I confess that in principle I think so.

49. (*Chairman.*) Or, rather, would not your opinion, from your previous answer, be, that the prisoner should be acquitted altogether by the Crown ?—I do not think that the Crown ought to take into consideration at all an improper conviction, that is to say, not upon the evidence which was before the jury. If subsequent facts came out which led the Crown to suppose that the jury had come to a conclusion different from that at which they would have arrived if those subsequent facts had been before them, then I think that the Crown might fairly interpose, which I certainly should do, not by imprisoning the person for life, but by giving him a free pardon.

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50. (*Mr. Hardy.*) Is there not some danger in answering an abstract question of that sort so broadly. Supposing, for instance, in a case of murder, that the facts which came out afterwards were such as in the opinion, for example, of the Judge, reduced it to manslaughter, in that case it might be very proper to imprison the man for life, but not to execute the capital sentence?—I am very much obliged to you for suggesting that. I think that that is a very right distinction. I ought not to say that you should give him a free pardon, but you should deal with him as you believe the jury would have done if those facts had been before them.

51. (*Mr. Attorney-General for Ireland.*) I happen to know a recent case where a man was tried, and the defence was insanity—incapacity to judge of his actions. The jury convicted the man, not believing that he was insane. The executive subsequently received information from various doctors who had not been produced, showing that the man really was insane, and in that case the prerogative of mercy was exercised, the man being retained in prison?—That would be the reasonable mode of dealing with him.

52. Am I to understand your Lordship to confine your view with regard to the application of Capital Punishment to cases of murder?—Yes, and treason. I think that treason certainly ought to be placed in the same category, because, although there may be some cases of treason which, as has been said, if successful cease to be crimes, yet you must treat treason as the highest crime known to the law; and if people are to be punished capitally for murder, I think that they should be punished capitally for high treason.

53. Then it would be confined to the two cases of treason and murder?—Practically to murder, in my opinion.

54. (*Mr. Hardy.*) Excepting, as I understand your Lordship to have said, in the case of infanticide immediate upon the birth?—Yes; it should be confined, I think, to treason and murder. I am hardly prepared to say that I can suggest an Act of Parliament for the purpose, but if an Act of Parliament could be framed, excluding from the category of murder, the case of a woman giving birth to an illegitimate child, and at the moment of parturition killing the child, I think that that case might fairly be excepted. I should in such a case say that the woman had rather prevented the child from coming into life than that she had murdered it.

55. (*Mr. Hunt.*) I think your Lordship has said that at present it is almost impossible to convict a woman for the murder of her child, during or immediately after birth?—I do not remember such a conviction ever taking place.

56. And in all those cases the jury find concealment of the birth, do they not?—Yes, by Act of Parliament they may do so.

57. Even though there is very little doubt that the child has been put an end to by the mother?—Yes.

58. (*Mr. Hardy.*) I rather think there was a case before your Lordship of a woman at Wakefield, who was confined, and left her child at the station, having cut its throat, and walked an immense distance; the jury there convicted?—I do not remember it, and I think that such a case would have made an impression upon my mind.

59. (*Mr. Hunt.*) Supposing that you abolished Capital Punishment in the case of infanticide, would you have a heavier punishment than that which ensues upon concealment of birth under the present law?—I think that the extent of punishment is two years' imprisonment.

60. What punishment would you inflict for infanticide?—I have

not considered that question sufficiently to answer it satisfactorily. Do you mean whether it should extend to penal servitude ?

61. For life ?—I should say not, but it is not a subject which I have considered. I have assumed the punishment to be the right punishment, if the prisoner is convicted only of concealment of birth.

62. I am assuming an alteration of the law in accordance with your Lordship's views, and that a woman killing her child during or immediately after birth, should not be liable to be hanged, what punishment would you say ought to be substituted ?—I am not prepared to say that the present punishment is not sufficient.

63. The punishment which now attaches to concealment of birth ? —Yes.

64. (*Mr. Neate.*) Your Lordship is not prepared to suggest any other alteration, without reference to the punishment in the present classification, and qualification of the description of murder ?—I am not. The distinction with reference to express malice and implied malice might perhaps be got rid of, but I do not know that this distinction has any practical operation. I always laid down to juries, that if a man commits a crime which he knows may probably lead to death, and it does lead to death, that is express malice.

65. Have not the views of the Judges undergone some little alteration of late as to what legally constitutes murder. For instance, your Lordship knows the often quoted case of the hen-roost, — of a man wishing to steal a fowl, and shooting at the fowl, and, without the slightest intention of murder, killing a human being. Your Lordship knows that that is laid down in books of authority as murder. Does your Lordship suppose that in the present day a Judge would direct the jury that it was murder ?—I should be sorry to commit myself to say what I should lay down if I were now a Judge, but I am much inclined to say that I should not lay down that to be murder unless the man was doing it in such circumstances that he must know that death probably would ensue, then I think, whether it is robbing a hen-roost or anything else, if he does an act which he knows may very likely take away the life of a human being, and it does take it away, it being done in the commission of a crime, it amounts to murder.

66. (*Mr. Waddington.*) The intention to kill has never been considered necessary to murder in that case, but an intention to do any injury ?—Yes; and I think that it would be very wrong if it were confined to the intention to kill. In cases of highway robbery and burglary, the parties would generally be glad to attain their object without killing if they could.

67. (*Mr. Neate.*) And yet there is an intention to kill, of which you must judge from the weapons with which the man goes about his business. If a highwayman had a pistol you must assume that he had a deliberate intention to kill if necessary, and the same with a burglar if he had a similar weapon ?—Yes.

68. (*Mr. Waddington.*) But the law does not require the intention to kill; all that is required is the intention to do some illegal and malicious injury ?—Yes.

69. (*Mr. Attorney-General for Ireland.*) The law implies that every man intends the consequences of his own act; that is the ordinary doctrine ?—Yes; and I think that it is a most reasonable presumption; there is nothing technical in it. Any deviation from it would be a technicality.

70. (*Mr. Hardy.*) The deviation came when the Statutes put in the intention to do grievous bodily harm, and so on; and it was then laid

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down that there must be a deliberate intent to do grievous bodily injury?—Yes, that was a distinction introduced many years since.

71. (*Mr. Waddington.*) With regard to the Secretary of State making use of the mercy of the Crown in doubtful cases, where the doubt arises from the evidence at the trial being insufficient, or from subsequent evidence being discovered, it has been suggested that to meet that, the Secretary of State might have the power of directing a new trial to be moved for; have you considered that question?—No; but I think that it would be open to all the objections which I have pointed out in that matter.

72. It would be the duty of the Secretary of State to take care that the witnesses on both sides attended, and he would be able to give facilities which would not be the case in an ordinary prosecution, would he not?—He would be able to give some facilities certainly.

73. Is not one of the objections to a new trial, that the prisoner in general would be in such a position in life that he would not have the means of procuring the attendance of witnesses?—Certainly.

74. Would not that be obviated in the case suggested, inasmuch as the Secretary of State would take care that the prisoner should have every means open to him?—Yes, as far as money was concerned it would obviate it.

75. (*Mr. Neate.*) Does your Lordship conceive that murder is a statutable crime, or a crime at common law?—Murder is a common law offence, certainly.

76. Not defined by Statute?—I will not say that in the last consolidation of the Statute Law it may not be included.

77. There is a definition given by the Statute of Henry VIII., and the words of that definition have ever since been observed in the form of indictment?—I should certainly have answered without hesitation that murder is a common law offence.

78. No doubt, before that Statute murder was a common law offence, but it was not distinguished from manslaughter, they both were liable to the same penalty; then came this Statute, which took away the benefit of clergy, which is a mode of making a capital offence, by taking away the benefit of clergy in the case of murder committed from malice aforethought. Was not it, then, the business of the Judges to proceed *de novo* upon that Statute, and to look upon the crime as a statutable offence, and to treat that Statute with the same strictness of construction as that with which other penal Statutes are construed. If your Lordship were to apply to that Statute the same principles of construction as are usually applied to penal Statutes, surely it would hardly extend to many of the cases to which it has been made to extend. I think that a very important point in the history of our law. Indictments have been held to be void which did not follow the language of that Statute. It has not been usual to put "against the form of the "Statute in that case made and provided;" but indictments for murder have been held to be bad because they did not state "with malice afore-"thought."—If it has been held that an indictment for murder was good although it did not say "against the form of the Statute," I should say that that is conclusive evidence that it is an offence at common law, and not by Statute.

79. (*Mr. Ewart.*) Your Lordship knows that it has been suggested that women should not be executed in this country, and that in some countries it has been the practice not to execute women. Your Lordship would probably not approve of that exemption?—No; I think that that is a wrong doctrine.

80. (*Mr. Waddington.*) It is the same as to children under 16 years

of age in several countries?—I have never considered what age it ought to be. I am afraid that you never can get any better definition than to see whether there was discretion to understand, and I think that you cannot safely say that no person under 16 years of age shall be hanged.

81. Those again, you would probably think, would be cases for the interposition of the royal prerogative?—I think so. You are very likely, I think, to get into error by attempting to define those matters more accurately, and, in my opinion, you had better leave that to the discretion of the Crown; the public will go along with the discretion which is exercised in such cases.

82. Has your Lordship considered the question of public or private executions, which is deemed by some persons of a very great importance?—I never considered the subject attentively till I was about to attend here, and I then turned it in my mind. I do not know that a person in my position is at all able to form a better opinion upon that subject than a person unacquainted with the law. I used to think that, as in everything else, publicity was a great object in executions; and I still think that there are some advantages in a public execution. Speaking theoretically, I should say that the criminal class are likely to be more impressed with the conviction that if they commit the crime of murder they will be hanged, by having seen a public execution, than only by hearing of it; but on the whole I am inclined to think that a private execution will be the best adapted to the modern state of society. Of course, great precautions must be taken that when you say "private" it shall not be entirely "secret"; but, supposing that proper precautions are taken, I rather think that the advantages to be derived from putting an end to the disgusting assemblages upon occasions of an execution will more than counterbalance the advantage of publicity. I do not see any principle which is to make a public capital execution necessary, which would not make a public flogging necessary. All other punishments are private. We have entirely abolished (I believe by Statute) public flogging; it cannot take place, I rather think, now.

83. I think that it may take place in some cases, but it is never done?—Practically it is abolished. Of course, all imprisonments and penal servitude, and all other punishments, are necessarily private. I think, therefore, that there would be no anomaly in saying that executions also shall be private. There is another circumstance which is to be considered. There is probably just as much pickpocketing going on at the Derby, and at other large assemblages of pleasure, as in these mobs at executions; but there is this distinction, those great assemblages of persons, though a great deal of criminality may take place, are not mobs in which the very lowest class of persons have it all to themselves; there is always a mixture of all ranks, and that, I think, tends to humanize the assemblage generally. I think it a misfortune when persons strict in their notions of morality and religion, abstain from going to all these assemblies of pleasure. It is very desirable that there should be a mixture of all classes when great masses are assembled, but you can never have that at an execution; you have nothing but the lowest class of persons, and I therefore think that they are assemblages very much to be deprecated. Though there are some advantages in public executions, I incline to think that they would be more than compensated by getting rid of the great assemblages upon those occasions.

84. Do you think that it would not diminish the deterring effect of the punishment?—It is extremely difficult to say whether it would

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or not. I rather think that it would not. I think that in former times it would have done so very much. I must assume that there will still be persons present at the execution, and that the account of it would be in all the newspapers the next day. The newspapers now are circulated all over the kingdom in 24 hours so that everybody may read them, and you may depend upon it that the criminal classes either read them or hear them read, and I think that this would have the same, or nearly the same effect as a public execution.

85. (*Chairman.*) You think that the information which is now given throughout the country would prevent any possibility of a doubt being left upon the criminal mind that the person was not executed?—I must confess that I think that the suggestion, that there would be a doubt whether the sentence was executed or not, is merely theoretical.

86. (*Mr. Waddington.*) It appears that it is the practice in one or more of the Australian colonies to have a coroner's inquest upon the body after the execution, that would remove all possibility of doubt?—I think that it would be necessary to take every sort of precaution to prevent the possibility of either cruelty being practised in the execution, or of its not being carried into effect; but I think that it might be done without the necessity of having it done in public, particularly in the presence of the public in London, where, in a confined place like Newgate, there is every sort of objection from the enormous multitudes which are there assembled. A coroner's inquest may be a proper precaution.

87. (*Mr. Neate.*) The objections do not apply with the same force in the country?—No.

88. The assemblages are not of the same character?—No; and that has led me to have doubts with regard to the opinion which I have expressed, and which I cannot say that I express with very great confidence. I do not know that I see quite all the evils which some people do in public executions, but I think that upon the whole they do excite great disgust in the minds of many people, and tend to indispose them to the retention of Capital Punishment, and I think that the deterring effect would be probably the same if they were private.

89. (*Mr. Hardy.*) The plan has been adopted in some parts of England of not giving notice of the time of execution, so as to have the casual spectators simply, and not to have a mob collected. That, I understand, has been done at Stafford and one or two other places with very great success?—I think that that is a very good plan. It also occurred to me that the execution might take place at a very early hour in the morning, as I believe is done in France; but my reasoning upon that subject would not have much weight, because, according to newspaper accounts, the people are there all night.

90. (*Mr. Hunt.*) Do you think that it would be possible to go half way between a public and a private execution, namely, to have the execution in the yard of the gaol, but at a considerable distance back from the street, so that persons might know that the execution was taking place, but could not see the contortions and the struggles of the person executed, and so that he should be out of the hearing of the jokes and the ribaldry which were going on amongst the crowd?—I have never thought much of that. In one of the returns, namely, from Denmark, I see that there is a very useful suggestion, which is, that all convicted felons should be obliged to witness the execution. I think that that would have rather a good effect.

91. From that answer I gather that your Lordship is of opinion that the witnessing of an execution has a deterrent effect upon the criminal class?—I think that it has.

92. And therefore you think that it would have a deterrent effect upon those of the criminal class who witnessed the execution, but did not happen to be in prison at the time ?—Yes ; but you cannot get a number of criminals to witness an execution without the inconvenience attending a public execution. Where you have not many criminals, but an enormous mass of other persons attending, the consequences are much to be avoided.

93. (*Mr. Hardy.*) In fact, the deterring effect is very much taken away by the brutality and callousness of many of the mixed mass of people. ?—Yes.

94. Whereas if the execution took place with solemnity before the prisoners in the gaol, it would be a totally different scene ?—I incline to think so.

95. (*Mr. Ewart.*) I think your Lordship has stated that criminals know that they will be hanged for murder. Would you qualify that expression at all from the uncertainty which attends an execution ? Do you think that they know it for a certainty ?—As it is not absolutely certain that they will be convicted, or, if convicted, that they will be hanged, of course it cannot be said that they know for a certainty that they will be hanged, but they pretty well know that if convicted they will be hanged, unless there are circumstances of a mitigating nature.

96. Your Lordship does not think as has often been said in public prints, that the question whether a man will be hanged is a lottery, in consequence of the number of cases in which the prisoner gets off ?—That certainly must always be so, unless you mean to say that every person who is convicted of murder shall be hanged, and that there shall be no power of mitigating the sentence ; to a certain degree the expression "a lottery" must apply, and that is a misfortune incident, I think, to all human arrangements.

97. Is it not rather more applicable in this case than in most other cases ; is it not an uncertainty ?—There is some uncertainty, no doubt, because till the man is actually brought upon the scaffold, and the rope is round his neck, there is hope. The old adage is, while there is life there is hope.

98. (*Mr. Attorney-General for Ireland.*) Does your Lordship's judicial experience enable you to form an opinion whether the infliction of Capital Punishment in the case of murder renders it more difficult to obtain convictions from juries, or whether the conviction is more frequently of a minor character ?—I have known one or two instances in which the prisoner was tried for murder, which to my mind was clearly made out, but nevertheless he was acquitted, and I believe that the acquittal was because the jury did not like to convict in a case where Capital Punishment would follow ; I have observed that.

99. You have observed that in more than one case in the course of your experience ?—There is only one case which occurs to me,—I by no means say that it may not have occurred in others,—but upon one occasion I remember particularly being much struck with it. I remember the case of a woman who was tried for poisoning at Lincoln in which the jury acquitted her ; there were three indictments against her for three different poisonings. She was acquitted upon the first, and my opinion was that she was clearly guilty, but she was convicted upon the second.

100. Upon the whole does your Lordship think that the substitution of a minor punishment for the punishment of death would appreciably increase the certainty of conviction for murder by juries ?—I rather think that, to some extent, it would, because in the case, for instance,

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which I have mentioned, my opinion is that the jury would have convicted had it not been that the consequence of their conviction would be that the prisoner would be hanged.

101. (*Mr. Waddington.*) Does your Lordship remember instances where in the case of murder attended with highway robbery the man has been tried for the murder and acquitted, but afterwards convicted upon the same evidence for the highway robbery?—I perfectly remember trying a case of that description. I was not present at the trial for murder, but I tried the highway robbery, and the evidence was so clear of the murder as well as of the highway robbery that I was astonished at the party having been acquitted, and Mr. Justice Cresswell, who tried the former case, told me that it was an unjustifiable acquittal. There is one circumstance which has occurred to me as to the necessity of some cases of murder at least being punished capitally, which is this. I presume that nobody would doubt that the most severe punishment next to death ought at all events to be inflicted for murder; in a case of murder every body would say that the person convicted ought to be punished in the highest degree short of death, which the law tolerates. Suppose the case of a person so convicted undergoing penal servitude for life. One of the members of this Commission I had the honour of sitting with on the Penal Servitude Commission, and I think that he will concur with me in saying that there is a very great apprehension in the minds of some of the warders of the persons who are so sentenced, and are undergoing penal servitude for life; every precaution is taken to keep weapons and the means of committing murder out of their hands, but there is no doubt that a certain terror operates in the minds of the warders. If you take away the punishment of death you will require some substitute to apply to a convicted murderer undergoing his sentence if he murders his warder, but *ex hypothesi* penal servitude for life is the heaviest punishment which the law will then tolerate.

102. (*Mr. Neate.*) Do you not think that that might be met by the warders being armed more than they are and by there being the fear of instant death to the prisoner?—It might of course diminish the chances of being murdered, but there is a very great temptation in such a case for a ruffian to commit murder, besides which I think that weapons of that kind entrusted in the hands of warders would be a very dangerous thing. The case which I suggest might be met by saying that the punishment of death should be inflicted only in the case of the murder of a warder.

103--4. (*Mr. Waddington.*) In your opinion, supposing that capital punishments were abolished, it would be necessary to make a distinction between murder and all other crimes, by sentencing a murderer to perpetual imprisonment?—Certainly; I think that the least you could do would be to sentence him to perpetual imprisonment, whether penal servitude, or in what other form I do not know. Penal servitude for life is what I should presume.

105. It must be rigidly carried out, I suppose, without any relaxation at all?—Yes; then it had occurred to me to consider whether, if you had penal servitude for life as the punishment for murder, and you were to say that for anything short of murder there should never be more than penal servitude, say for 20 years, that might not be something which would have an effect on the criminal class to induce them to abstain from murder, but I do not think that it would, because the distinction between being confined for life and confined for 20 years, would, as I believe, have no practical effect upon the mind of a criminal.

106. (*Chairman.*) Would you not, in the sentence of confinement for life, run the risk of inducing the parties to think that it might be relaxed by some legislation or by the Crown, and that in point of fact they would not be imprisoned for life, though they had committed a murder ?—I have no doubt that that would operate strongly upon the mind.

107. And, therefore, the certainty of the punishment would not be stronger than it is now ?—They would think that in all probability something would occur to prevent their being confined for life, and they would think rightly.

108. (*Mr. Waddington.*) There would always be the hope, at all events ?—Yes ; and the matter would be very difficult.

109. (*Chairman.*) Your Lordship gives it as your decided opinion, that in the cases which you have enumerated, namely, treason and murder, you would still continue to inflict death ? — That is my opinion.

110. (*Mr. Attorney-General for Ireland.*) Your Lordship does not think that the greater certainty of conviction which might be produced by the minor punishment, as contrasted with the greater punishment, would be felt as much as the present punishment ?—No ; I have no doubt that the fear of Capital Punishment has an incalculably greater effect on the minds of criminals than the fear of any other punishment, and one proof is, that after a criminal has been convicted and sentenced to death, one never hears of a case where, if his punishment is commuted, he does not think it the greatest boon, and does not fall down upon his knees and thank God. What does all that mean ? It is because the other punishment is so much greater in his mind.

111. (*Mr. Neate.*) If you were to say to a prisoner before he committed the act, "Now, you are about to commit a crime, do you wish "the punishment to be capital, or do you wish it to be imprisonment "for life ?" Do you not think that there are many criminals who would say, "I do not see much difference between the two, but I "consider that the chance of an acquittal is much more in my favour if "the punishment is death, so that I think that I would rather it should "be death." It is still possible that that man, when he came to be tried, and no doubt every single person, without exception, when he was going to be punished, if the judge asked him, "Shall I sentence you to "be hung, or shall I sentence you to perpetual imprisonment," would say, "I prefer perpetual imprisonment." If you had asked the same man before he committed the act, he might have said, "I would rather "that it should be death, I shall have a greater chance of escape," and the difference in the chance would outweigh the difference in the punishment ?—If you ask me my opinion (it is a matter upon which nobody can be certain), I do not at all think that it would be so.

112. Take such a man as Thurtell, for instance. He would say, "I do not much care which it is, but upon the whole I would rather "it should be capital, because I have a greater chance of being "acquitted ?"—I do not think so. I do not think that any criminals I ever saw would say it.

113. (*Mr. Ewart.*) Taking a general view of the question, which, in your Lordship's opinion, has the greater certainty of execution, the punishment of death or a minor punishment ?—I think it is much more likely that a minor punishment will be actually carried into effect than the punishment of death; every endeavour will be made to get the prisoner off in the one case, which will not be made in the other. In the case of a small punishment it is very rare that it is not carried into effect.

114. (*Mr. Waddington.*) And juries are naturally not so inclined

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to convict in cases where the punishment is very severe as they are in small cases, such as larceny ?—Just so.

115. The number of convictions for larceny bears a much larger proportion to the number of committals than in cases of rape, or burglary, or any serious offences ?—Yes.

116. (*Mr. Ewart.*) And there are more applications to the Home Office in the serious cases ?—No doubt the more severe the punishment the more stir will be made, both by the criminal and by his friends, to get it reduced ; and in no cases are the applications so great as in the case of the punishment of death.

117. (*Mr. Waddington.*) There is another argument against Capital Punishment which has great weight with many people, namely, the possibility of executing an innocent man. Have you ever considered whether the possibility of that is of such weight as to have any effect upon your opinion ?—I cannot say that it is impossible. The only case in which in modern times I think it has been possible is, that there may not have been a proper distinction between murder and manslaughter. That may sometimes be doubtful, and in 99 cases out of 100 the Judge will lean to manslaughter. It may be that a case may have occurred in which the offence ought to have been found manslaughter, and has been found murder, and so the party has been executed, but I have never known such a case, and such cases must be so extremely rare, that I think, considering that all we can arrive at is the best approximation to perfect justice, that consideration may be disregarded. It is commonly said that it is better that nine guilty persons should get off, than that one innocent person should suffer. That is true perhaps, but it is not true to say that it is better that 999 guilty persons should get off, than that one innocent person should suffer.

118. (*Mr. Ewart.*) It is laid down by Beccaria and many eminent foreign jurists that the infliction of a lesser punishment, if certain, has permanently a greater effect in the prevention of crime than the infliction of a greater punishment which is uncertain. Does your Lordship agree with that doctrine ?—Within certain limits I think that that is true, but I do not think that these are questions in which, strictly speaking, the opinion of a jurist is to be considered. What most operates upon the mind of a criminal is a matter which the experience of mankind must judge of, and it must not be judged of upon any question of jurisprudence.

119. Has your Lordship ever statistically inquired into that question particularly in Tuscany ?—No, I have not had the opportunity of doing so.

120. Your Lordship is not aware that that appears to be borne out by experience, as well as by theory ?—I was not aware of that ; I have no doubt of the accuracy of what you state as a general proposition, that certainty of punishment will somewhat compensate severity, that is to say, that a punishment which is much lighter if it is quite certain, will be more deterrent than a punishment which is greater if it is very uncertain.

121. (*Mr. Waddington.*) It must of course depend upon the degree of lightness ?—Yes, and of the degree of uncertainty.

122. (*Mr. Attorney-General for Ireland.*) I understand you to say that you do not think that the greater certainty which would be produced by the abolition of Capital Punishment, would make up for the want of the deterrent effect which Capital Punishment exercises ?—That is my opinion. I presume that nobody is enamoured of Capital Punishment as a thing to be of itself admired, the question is, whether we can safely get rid of it.

123. (*Mr. Waddington.*) Do you recollect in your experience the

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case of a person entirely innocent, (I am not speaking of the distinction between murder and manslaughter,) who was executed ?—No.

124. (*Mr. Ewart.*) That may have happened in former times, but it is scarcely possible in these days ?—I should think that it is hardly possible. I do not think that it could well occur in the case of a man convicted upon circumstantial evidence, but it might occur in the case of a man convicted upon direct evidence of identity. A mistake might occur as to the identity of the criminal. It might occur from such a mistake that *A. B.* has been convicted of a murder, when *C. D.* was the guilty person ; such a thing might be imagined, I could hardly suppose it possible, but if that was the case, a stir would be immediately made, and it would be investigated ; there would be so many circumstances which would occur in these times that if a man was wrongly convicted, he being the wrong man, I think that it would be almost a certainty that it would be found out, and that he would be immediately pardoned. In answer to the question put to me, I will say that I never saw the case nor anything like the case. I have known in my experience cases of persons wrongly convicted (not of murder) upon direct testimony, but I have never, so far as I am aware, known a case of a person wrongly convicted upon circumstantial evidence. It often occurs that persons form a positive opinion as to *A. B.* being the person whom they have seen committing a crime ; they swear to it, and convince themselves of it, and then they sometimes convince the jury. I remember a case at York in which a man was convicted of burglary of a very grave nature, which crime was then capital ; I ordered sentence of death to be recorded, but told him that he would certainly be transported for life. He, immediately after I sentenced him, said, "My Lord, I "know no more about what they had all been saying (he had a counsel) "than a child unborn." There was something in his tone and manner which struck me with the belief that the jury had been wrong, that they had formed a wrong conclusion as to his being the burglar. The case was afterwards investigated, I forget now all the details of it, but it was proved to perfect certainty that the man was as innocent as I was myself, and he was of course let off. That was a mistake arising from what the common people think is the strongest evidence, namely, positive swearing to somebody as being the criminal; but I have never known such a case as that happen in murder.

125. Does not some difficulty arise from the different definition which is sometimes given of insanity ?—Yes, very great difficulty.

126. Is not it the case that a medical man would state a prisoner to be insane, who according to our law would not be deemed insane ?—I am not able to answer that question. I think that there has been a great deal too much tendency in our law to treat persons as exempt on the ground of insanity, when they really ought not to be so treated.

127. Is not there a variation between the medical opinions and the legal definitions upon the subject ?—I am not able to answer that question ; very likely it is so.

128. (*Mr. Hardy.*) With regard to the expediency or inexpediency of an appeal being allowed, I find that your Lordship gave an answer to that question in a letter in the year 1848, which is appended to the Report of the Select Committee of the House of Lords, to whom a Bill for the further amendment of the administration of the criminal law was referred. Your Lordship has probably forgotten it ?—I am much obliged to you for calling my attention to it. I can only say that after reading it I do not wish to correct a word of it, although I had wholly forgotten it.

His Lordship withdrew.

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129. (*Chairman.*) Your Lordship has had considerable experience on the bench in matters connected with the trial of prisoners ?—I have.

130. Will you favour the Commission with your views generally on the subject of Capital Punishment ?—I shall be most happy to give the Commission any information in my power, but I really do not know that I can add to what I have said in writing. I am quite aware that that is but very little, for it is more a series of suggestions than a statement of any facts, or any definite opinions which I have.

131. Would you deem it advisable to retain Capital Punishment in cases of murder and treason ?—I certainly should think it advisable to retain Capital Punishment for murder. As to treason, I confess that it has never occurred to me to speculate upon it. It perhaps is a worse offence, in some respects, than even murder, because it involves the taking of life and the alarm of the whole country ; but, still, I can very well see that it may not be an expedient punishment in that case, because it is not a case in which the public feeling goes to the infliction of Capital Punishment, in the same way as I think it does to the infliction of Capital Punishment in the case of murder. It is in vain to have a law in the administration of which the public disposition will not fairly assist. I do not want to speak at any length upon such a matter as that, but as regards treason, I think that if it were limited to mere conspiracy, without an actual forcible outbreak, it would then not be a desirable thing to inflict Capital Punishment upon it ; but where there is an actual outbreak it is different. Take it even in the trumpery case of Smith O'Brien's treason in Ireland ; that man was guilty, not merely of treason, but he was guilty of acts which were very likely to take away human life, and he was in that happy situation in which traitors commonly are, that is to say, he had a great deal of public sympathy with him, instead of having it entirely against him, as the common murderer has. If he had succeeded in his crime, instead of being tried, he might have been King of Ireland, I suppose, or something of that sort—a person of great consequence ; and whenever the commission of a crime is so profitable and advantageous as that if you succeed you get a great advantage, and, if you fail, you have an immense quantity of public sympathy, one would think that it would be reasonable that the law should step in and say, "We will endeavour to deter "you from the commission of so tempting a crime ;" but still it is to be borne in mind, as I have before said, that I do not think that public opinion would go with punishing a man for treason, when his treason, however foolish, was what others might call honest. Then it is impossible to discriminate between honest treason and dishonest treason, and the result is, that I should think that in most cases, and perhaps in all cases of treason, Capital Punishment would be an inexpedient punishment.

132. (*Mr. Neate.*) Are you aware that the punishment of death is entirely done away with in France for political offences ?—I was not aware of it.

133. (*Mr. Attorney-General for Ireland.*) Your opinion is that in every case of treason which is not accompanied with murder the punishment should not be capital ?—I think so. It never occurred to me to consider the question before, but answering it upon the spur of the moment, I think so.

134. (*Chairman.*) With regard to murder, you would still retain Capital Punishment in all cases of murder ?—I think so.

135. (*Mr. Ewart.*) In cases of infanticide, would your Lordship retain it ?—I must answer that question in this way. Where the jury find that the legal offence of murder has been committed, which involves their finding that the child has been born alive, and afterwards has been wilfully slain by its mother, I would make no distinction between that murder and any other, so far as the law is concerned; but ordinary cases of infanticide are cases in which the jury do not find that the crime of murder has been committed, because they do not find that the child has been born alive, and has consequently been a subject of murder according to law. Whether, if I had to consider whether the sentence should be carried into execution or not, I would carry it into execution is a very different matter ; but I think that any law which should say that the murder of a child up to a certain age should be one offence, and the murder of a person older should be another, or should be punished differently, would be an objectionable law. I think that it is impossible to draw any line. If you were to say that the killing within 24 hours after the delivery of the child should not be a capital crime, but that in the 25th hour it should be so, people would revolt against a distinction which had no real existence, and they would naturally say, " Why not extend it to a month ?" and if you extend it to a month, by a similar process of reasoning you might extend it to a year, and I cannot see where it would stop. I hope that I shall not be supposed to be under the influence of that sort of feeling which makes people object to a good thing, because from it bad inferences may be drawn. I think that it would be in itself a bad thing. I think that it would be intrinsically bad. The remedy for such a state of things to my mind should not be in the law, but in the prerogative of pardon.

136. (*Mr. Waddington.*) Would you make any distinction between infanticide by the mother of an illegitimate child and by other persons ? —That is a remark which I intended to make, but forgot it. One would be inclined to ask what is in the mind of those who propose it. Is the mother alone to be exempt or is any one who kills the child to be exempt.

137. The idea is that the mother is to be exempt if the murder takes place at or immediately after the birth on account of her distressed state of mind, and the passionate desire which she would have to conceal her shame ?—I rather think that a very great jurist has laid it down, that the greater the temptation the greater the necessity for punishment. If she is under a passionate desire to conceal her shame, it is just as well that the law should step in with some strong deterrent against that which induces her to take away the life of the child which she is bound to take care of. If you made a law that a mother killing a child, immediately or presently after its birth, should not be guilty of a capital offence, would you limit it to her or would you extend it to the case of anybody else ? Would you say, for instance, that the mother's mother, or father, or brother, or anybody else who desired to conceal her shame, should not be guilty of murder ? Would you say that the putative father of an illegitimate child, with the same motive, should not be guilty of murder ? If you got to the extent of exempting these people from the crime of murder, the next step would be the question, Why should not any one else be exempted, and that would almost bring it to this, that it would be the mere age of the child which should be looked at, and then this difficulty would immediately be suggested that somebody might murder

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a child of the given age not for any advantage which it would be to its parents, but for some harm which it would be to its parents, and in each case the crime would be the same, namely, the taking away of the life of the child, although the motive might be different.

138. (*Mr. Ewart.*) Does not there enter into the question not only the justice or propriety of awarding a different punishment for the same crime, but the hazard of the criminal not being found guilty by the jury, does not the practicability of executing the sentence enter into the question, as well as the abstract question of punishment?—I dealt with that subject in the observations which I had the honour of sending to the Commission, but I would repeat shortly what I there stated. Under the present contrivance, if I may venture so to call it, or practice of the law, the mother is never found guilty in what is undoubtedly a case of infanticide, the reason being, that if nobody is present who can be called as a witness (and nobody ever is present, except a person who will screen himself or herself upon the ground that the answer would criminate him or her) there is always a possibility that the fatal injury to the child may have taken place before the child was thoroughly separated from the mother's person, and in that case it is not the subject of the crime of murder. I will not say whether it is a right condition of things that the jury should always be told as they always are, "There is a possibility of this child not "having been born alive, and, therefore, though you have medical "evidence to show that it breathed, and although you have evidence "to show that it was improbable that the mother could have inflicted "such an injury as it died of during parturition, yet, inasmuch as "there is a possibility of it,"—which the medical witnesses never will negative,—"therefore you must acquit her of infanticide." Whether one would draw the conclusion that the woman would be found guilty, if a particular punishment were not the result of finding that verdict, I will not say, but so it is according to the present administration of the law.

139. (*Mr. Waddington.*) And that appears to be correct according to the state of the law, is it not, namely, that a person cannot be found guilty without positive proof?—It is correct according to the state of the law in one sense, but I do not believe that it is correct according to the state of the law in another. No doubt the jury will not find the woman guilty unless the evidence is reasonably convincing that she is so; but when one has the case of a woman who has made no preparation at all for the child, and when the child is found with a piece of string tied twice round its neck, and tightly, and there is a concealment of the birth, I think one would say, not acting as a juryman, and not anticipating any consequence from one's verdict, that that woman must have waited till the child was born, and then have killed it, and one would act upon that opinion. I think that one would have a reasonable satisfaction of it, because it is inconceivable that the woman can, for instance, as I have had cases before me, twice tie a string round the child's throat, and tie it closely, while the head is projected from the body of the mother, and before the rest of the child is in the world. Therefore, I doubt very much whether the sort of direction which is given to the jury, I will not say is a legal one, but is a right one in point of reasoning; but they are always told that, inasmuch as the surgeon will not venture to say that the child was born alive, in the sense of being entirely separated from the mother before the death took place, they should acquit the prisoner of infanticide, and of course they are always glad to do it, and they always do it.

140. (*Mr. Hunt.*) Would you not get out of that difficulty by making

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it a substantive offence to kill a child during birth, an offence less than murder, and greater than concealment of birth ?—That is a matter which I have not thought of with reference to your Commission, but I have thought of it since I have been on the bench for this reason, that it has happened that the woman has made no concealment of the birth at all, and consequently cannot be punished for that, and yet there has been the gravest reason for believing that she has killed the child ; but inasmuch as you must deal with her as you must in the case of a woman who has concealed the birth of the child, the result is that she is acquitted, and she is subject to no punishment at all. She is not punishable for concealment, because she has not attempted to conceal ; she is not punishable for infanticide for the reason which I have endeavoured to give you, and I am not aware that the law has provided for the case of the mother killing the child during the act of parturition.

141. Was not the old rule of law this, that the breathing of the child was the test of life ? Is not the doctrine that the child must be wholly separated from the mother before it is killed, as an essential ingredient of murder, a modern doctrine ?—I think not, but I speak with reserve upon that point. I should like to look to my books, because naturally, when one is administering the law, one is pretty well content to find out what it *is* without concerning oneself with what it *was*, unless there is some reason for it.

142. (*Mr. Hardy.*) Practically now the only punishment for infanticide is two years' imprisonment for concealment of birth ?—Practically that is the limit of the punishment. When the child has been seen alive after it has parted from the mother, the sort of contrivance, as I may call it, by which women are now acquitted cannot be used.

143. There would be direct evidence of the child being a separate person ?—Yes.

144. (*Mr. Hunt.*) Your Lordship says that at present there is no law by which the woman can be punished for destroying the child before it is actually born, if she does not conceal the birth ?—There, again, I desire to speak with some reserve, because I think that I am right in saying that a procurement of abortion would be an offence at common law ; if it would, it seems to me almost to follow that the wilful killing of the child at the moment of delivery would be an offence at common law.

145. Is a woman ever practically indicted for such an offence ?—I have not known such a thing. Perhaps because, usually, they are convicted of concealment.

146. Do you think that two years' imprisonment is an adequate punishment for such an offence ?—I am not come prepared to answer that question.

147. I do not speak of concealment only, but of concealment where you believe that the child has been destroyed ?—It is a very embarrassing question to answer. I have never thought upon it at all.

148. (*Mr. Waddington.*) The circumstances under which these either abortions or murders take place are very various, are they not ? —Yes.

149. So that it is difficult to lay down a general rule ?—It is.

150. (*Mr. Neate.*) I observe that in your last letter to the Commissioners, as the result of your experience, you use these words, " Six " prisoners in six cases were acquitted on the ground of insanity, and " rightly. I do not mean that the prisoners were as insane as the law " requires." I observe that you say that they were rightly acquitted, although they hardly came within the limits of legal insanity. Have

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you any alterations to suggest in the legal definition of insanity ?—No ; I think that the legal definition is perfectly right.

151. But you say that they were rightly acquitted, although their insanity was not to the extent which the law requires ?—I will explain that observation, which is, no doubt, an apparent contradiction. What I mean is, that according to the practice of juries, which has met with the sanction of Judges, or which has been without any reprobation from the Judges, and which is in accordance with public feeling, those prisoners were rightly acquitted.

152. Then would it not be possible to bring the law upon that point into harmony with public feeling, and with what you seem to admit to be right public feeling and right judgment ?—I am not so sure that the public feeling is right upon it. I will explain myself if the Commission please. I understand that by law insanity is an excuse in two cases. One is where the state of mind is such that the person is not aware of the nature and consequences of the act which he is doing, as, for instance, he is so idiotic that he does not know that to cut off a man's head will kill him, or hurt him ; a very improbable case, but I believe that there is an instance of a man who did so, and, upon being asked why he had done it, said, that it was in order to see how the sufferer would look when he awoke—a state of hopeless and utter idiotcy. That is one of the cases, namely, where the mind is such that it is not aware of the nature and consequences of the act which it is doing, or that it is wrong to do it. The other case is, where there is a delusion of such a nature that if the supposed facts were true the person would be justified in doing the act which caused death. For instance, if a man were under a delusion that another were attacking him with a murderous weapon, he would be justified in killing that person. There are very few persons who are so mad as to be within either of those two categories, in my opinion. I think that that law is right, because, although it may sound a cruel thing to say so, yet where a man has the misfortune to be in such a condition as that the ordinary deterrents from crime, be they what they may—religion, morality, love for the good opinion of his neighbours, pity, and other considerations—do not deter him from a crime which he is otherwise disposed to commit, perhaps from some strong natural propensity to the commission of it, in such a case, although one may be very sorry for him that he should have that temptation, without having strength of mind enough to resist it by itself, it is all the more necessary that the law should step in and deter him. The matter may be argued thus :—You punish because the law threatens punishment ; if punishment were not inflicted, the law which threatens it would be idle. Then, in order to see whom you should punish, you should find out whom you may reasonably threaten. The persons whom you may reasonably threaten are those who are sensible of your threats, and who, but for them, might commit the crime, the consequences of which you threaten upon them. If that is a correct piece of reasoning (and it seems to me to be demonstrative), the unhappy madman is a person who requires the threat more than anybody else, because, from the condition of his mind, he is more likely to have some temptation to commit the offence, and less intelligence to deter him from doing it. So that, although one may feel that his case is a more pitiable one than that of a person in full possession of his faculties, yet he is a person upon whom the threats of the law are more necessary than upon a person in the full possession of his faculties.

153. (*Mr. Ewart.*) Does your Lordship think that the threats of the law would deter in all such cases ?—Not in all such cases, nor do they

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in all the cases of sane men ; but you must not take away punishment from those people upon whom it may operate sometimes because it will not operate always.

154. (*Mr. Neate.*) Would not your argument, if it was followed out, almost go to the length of saying that you would inflict heavier punishment upon insane persons ?—I admit that it is almost a logical conclusion from my argument, namely, that the greater the temptation under which a person is to commit an offence, the greater ought to be the restraining considerations upon him ; there can be no doubt that a madman is deterred by the threat of the consequences. Many a man who declares himself to be under an uncontrollable impulse, finds that impulse controlled when a policeman is at hand ready to take him if he does the act. In a case which I tried, I actually had it sworn by one of the mad doctors that he believed that the man was under an uncontrollable impulse, and he afterwards said that he believed that if a policeman had been there the man would not have done the act, so that I put it to him, "The uncontrollable impulse is controlled by the "presence of a policeman." But the difficulty may be retorted; for if my argument leads to that conclusion, the other leads to this,—That no madman, whatever his madness, should receive any the least punishment for any crime.

155. Do you not think that you must make a great difference in the case of madmen or persons of weak intellect, between the threat of remote punishment and the threat of immediate punishment. We know that persons in Bethlehem are amenable to the threat of immediate punishment, but do you think that they are amenable to the threat of remote punishment ?—I do not think that they are to so great a degree as some people, but my opinion is that they are in some degree.

156. Then you would not permit the fact of any delusion to be a legal defence, except the delusion was such that if the thing supposed were real it would afford a justification for the act committed. For instance, supposing that a man could really believe that he had a glass leg or a glass trunk, he would still be liable to the penalties of the law ?—I think so. I do not see why a man should murder with impunity because he believes that he has a glass limb. Might he forge or steal ? There is a well known case, which one may put by way of illustration :—A man had some mania upon the matter of windmills, and a person, to cure this mania, removed him, I suppose, to a country where all the mills were water-mills. In order to get away from that neighbourhood, he with circumstances of great barbarity killed a small child. Why should not that man be punished ? Suppose that there were half a dozen people with that propensity, it might be that upon one of them the threat of punishment would have no effect, and that the mania would have too great an effect upon him, but who can tell whether the other five would not be deterred ? It should always be borne in mind that we have no statistics of the number of people who are prevented from committing crimes by the threat of Capital Punishment.

157. Must not there be the condition of justice in inflicting the punishment ? Even if it is assumed that, whatever the penalty may be, you, by punishing men of weak intellect in the same degree, increase the security, must it not be also seen that it is just to do so, and that the parties punished are amenable to the sense of justice ?—I am not aware of any justice in this matter, *ultra* expediency.

158. If a man really believes that he has a glass limb, does not it amount to his being incapable of reason in every way, that is to say, incapable of believing either the evidence of his senses or the con-

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clusions of logic in any way? Assuming that a man who really believes that he has a glass leg disbelieves the word of everybody around him, and he disbelieves the evidence of his senses, and he is the subject of a delusion, he is a man incapable of arriving at the truth by any one of the ways by which people do arrive at the truth. What right have you to say that that man knows anything of the consequences or the nature of his acts, although he may repeat by rote certain words that he knows that such a thing is wrong, and that he shall be hanged for it?—If that was the only evidence, I should have no right to say so, but if a man was reasonable upon every question but that of the glass leg, I should have a right to say so.

159. Can he be reasonable upon every other subject?—Yes. I am not now speaking as a lawyer, because this is not a matter of particular legal knowledge or judicial experience; but I have present in my mind at this moment the case of a man whom I knew who laboured under the common delusion that he was in a state of great poverty. I know that his banker's book was fetched to him and shown to him, and that he saw the balance to his credit; the delusion ceased for a moment, but immediately the book was shut up it returned upon him, and I know that that man upon all other subjects was capable of conversing as rationally as anybody else.

160. I do not suppose that a man ever believed that he had a glass leg, except an actual madman?—He is mad no doubt.

161. (*Chairman.*) It is quite possible that a man who believed that he had a glass leg, would know perfectly well that if he put a pistol to your head, and pulled the trigger, he would deprive you of life?—Certainly.

162. (*Mr. Ewart.*) A mania may be a monomania, may it not?—Certainly.

163. And a monomania may exist in the case of murder, may it not?—No doubt. When I say that a monomania may exist in the case of murder, I must observe that when a man is labouring under monomania, and if his delusion upon that particular subject had a reality, he would be justified in taking away life, his monomania would excuse him; but I cannot understand how there can be a monomania to commit murder, that is not mania.

164. (*Mr. Waddington.*) Is there not a mania, which the medical men call homicidal mania, which consists in an uncontrollable impulse as they call it to take life?—There may be such a thing, but I vastly disbelieve in it; there may be persons with that vitiated taste or disposition, that they strongly desire to take life, or they strongly desire to take a purse. And I believe that persons have invented another thing, namely, dypsomania or a strong desire to get drunk.

165. And kleptomania?—Yes; which is stealing, but that is not the condition of the mind, but the condition of the passions and the appetites.

166. Suppose that it was produced by a disease of the mind, it would make no difference, in your opinion?—No; you must guard against monomania. If I had two children, one of whom had a great propensity to rob my orchard, and the other had not, the one that I should check most, would be the one who had the great propensity; to the other who had not a great propensity, I should say, if he happened to commit the offence, "This is a great pity, and I hope that "you will not do it again," and I should let him off, but the one with the strong propensity I should flog well, if flogging was my remedy.

167. (*Mr. Ewart.*) And if his propensity were declared by a medical

man to be what they call a mania, would you still continue to flog him?—I should cross-examine the medical man first.

168. (*Mr. Neate.*) You would try one or two floggings first?—Yes; I would first see what the medical opinion was worth, because medical men talk a very great deal of nonsense.

169. (*Mr. Waddington.*) In one case, I think, I remember your putting a pertinent question to a doctor, whether he thought that there was an uncontrollable impulse to commit a rape?—I do not remember that case.

170. (*Mr. Neate.*) I believe that our secretary gave you a short paper which I have drawn up?—Yes.

171. Is there anything which you wish to say with reference to it?—I read it more with a view to your putting a question to me upon it, than with a view to volunteering any criticism upon it, which I should say respectfully I would rather not do.

172. Do you conceive murder to be a statutable offence or a common law offence?—A common law offence.

173. And do you conceive that it did not proceed upon a new basis after the statute of Henry VIII.?—I never understood so.

174. Is it not necessary in indictments to introduce the language of that Statute; unless you indict a man in the particular words laid down in that Statute, is not the indictment bad?—I really cannot answer the question, for I have not the words of the Statute in my mind; but there is no doubt that the indictment must say that it was "with malice aforethought."

175. And wilful?—I think wilful.

176. (*Mr. Waddington.*) "Feloniously and wilfully, and with malice "aforethought?"—Yes.

177. (*Mr. Hunt.*) Since that Statute was passed has the form of the indictment been altered; were not the words equally necessary before the Statute?—I think so, it is a common law offence.

178. (*Mr. Neate.*) It was a common law offence before that Statute, and the only point is, whether it did not then start upon a new ground. It was mixed up with other homicides; there was no distinction in the punishment between the cases of homicides. Then the Statute intervened, and said, "For this particular murder we will define that there shall be no remission"?—I should say, with great respect, that it recognizes the common law offence.

179. (*Mr. Hardy.*) I see that your Lordship has expressed an opinion in favour, not of an actually private execution, but an execution with a certain amount of publicity, instead of an absolutely public execution, which there is at present?—If I may be forgiven for not answering in a straightforward way, I really have not sufficient confidence in my own judgment to express an opinion upon the point at all. I ventured to suggest it to the Commission in order that they may form their opinion, but I really have not an opinion myself. I think that it is an extremely embarrassing question.

180. (*Chairman.*) It has not come before you in any form?—I should think that a Judge or a practising lawyer, as I have endeavoured to state, has no more knowledge upon such a subject as that than anybody else.

181. (*Mr. Hardy.*) What a Judge would observe would be the effect of the sentence in the Court?—In my poor judgment that is the only case where he is able to speak with anything like authority.

182. And that, I believe you will agree, is very solemn?—It is awful.

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183. And it is felt to be so by all those who are present? — Certainly, very much so.

184. (*Mr. Waddington.*) In your experience, do you think that the disinclination of juries to find a prisoner guilty of an offence for which his life would be forfeited is an impediment to the administration of justice?—I think not.

185. Your experience is the other way, is it?—I have made a return. I should be very glad to go into details upon it if the Commission would be pleased to have them, but, otherwise, they may take my representation as being an accurate one. I have stated that I have tried 55 persons for murder; in 44 cases there were nine cases of infanticide with 10 prisoners, you must leave them out altogether; but I thought that as I was making this return, I must make the return as I have made it. That reduces it to 45 persons. There were six other cases with seven prisoners, where the verdict was manslaughter. I have mentioned one of those cases: it was the case of a man who had not actually found his wife committing adultery, but who had found her immediately after she had done so, and the jury insisted upon finding him guilty of manslaughter only, though I told them that I could see no evidence upon which they could do so.

186. That would be an instance where the fear of the man being hanged induced the jury to find an improper verdict?—No doubt; but I am by no means sure that they would not have found the same verdict if the punishment had been penal servitude for life inevitably, because it was not the special nature of the punishment which influenced them, but it was because they thought it an excessive punishment, and I believe that they would have thought a minor punishment excessive. I have mentioned that a good many of these cases in which the verdict was manslaughter, were cases of people tried for murder upon the coroner's inquisition. Some of these people I have sentenced to three months' imprisonment, and yet the coroner's jury has returned a verdict for murder. There are other cases which are cases of insanity. The last which I tried was the case of a man at Beaumaris; he had been in the militia. I am afraid that his raving madness (for such it was) had its origin in drink; he was labouring under delirium tremens; he went out and I think for about six hours during the day walked backwards and forwards in a field with his militia musket and acted as a sentinel; he was upon no duty; it was sheer frantic madness that made him do it; he threatened everybody who came near him, his friends and others, and when night came on he left. Of course all the boys and all the people in the village went after him; he ran away and went into a neighbour's house, and went into a loft over a room. The unfortunate person who was shot was a friend of his, and he said "Oh, he will not hurt me," and he put his head up into the loft where the man was, and he was shot dead immediately. That was a case of what I should call raving madness.

187. (*Mr. Neate.*) What was done to that man?—The verdict was, "Not guilty" on the ground of insanity, and he was sentenced to be confined during Her Majesty's pleasure. Another case which I remember was one of the most painful cases that I ever tried. A young woman had an illegitimate child a year old; she was very fond of it, and behaved very well to it. What particular thing it was which so disturbed her I do not know, but I have some reason to suppose that she was about to be married, and that a person had threatened to inform her intended husband that his brother was the father of the child. Whether that was the cause or not I do not know, but on a Sunday morning the child's clothes were hanging before the fire to

dry, and she was evidently intending to dress it, and take it out and use it well, as she had always done. She cut its throat, and she rushed out into the street and said that she had done so, and was immediately taken into custody. I cannot in my own mind believe that that woman was as mad as the law would require her to be to have her acquitted, but it was an act of such a character that the only address to the jury was, "This woman may have had a sudden con- "dition of mind come upon her, in which she really did not know "what she was doing." She was a very decent looking young woman, everybody in court wept, the counsel on both sides and the jury and everybody; and the result was that she was acquitted; but I think that she would have been also acquitted if the sentence had been penal servitute for life inevitably.

188. (*Mr. Waddington.*) She was acquitted on the ground of insanity?—Yes.

189. Have you known instances of acquittal upon the merits which have been induced by the fear of Capital Punishment?—Yes, in the same way as I have mentioned to you the case of manslaughter. Perhaps I shall better answer that question by saying that I have known one case certainly. It was the case of a man who had killed a woman with whom he was living, under this provocation, that she told him that she had just been out and had been having connexion with some navvies in the market-place, and he killed her. The jury asked me whether they could find a verdict of manslaughter. I said, "I see "no ground for doing so," and then they acquitted him altogether. They very likely would have done so if they had known that penal servitude for life would have been the inevitable consequence of a verdict of guilty.

190. I suppose they did not know that manslaughter was also punishable with penal servitude for life?—I use the word "inevitable," but what was in their mind I cannot tell. I have no doubt that if they could have returned a verdict of manslaughter they would have done so; but whether, if it had been open to them to return a verdict of manslaughter, or something less than manslaughter, and they had known that penal servitude for life would have been the punishment for manslaughter, they then would not have returned something less, I cannot say. I think that the objection of that jury was not so much to Capital Punishment in itself, as it was that it would be too severe a punishment for the offence.

191. (*Chairman.*) Have you ever considered the propriety or not of allowing the jury to find extenuating circumstances? Would you allow them the power of bringing in such a verdict as that, with a view of reducing the punishment?—I would not.

192. You think that they should decide upon the fact,—aye or no; is the prisoner guilty or not guilty of the crime with which he is charged? without bringing in extenuating circumstances?—I would not give them that power; and I may make a remark now to the Commission which perhaps they may think worthy of notice. Where a jury have an option of finding a man guilty of one or the other of two offences, they will almost invariably find the minor offence. There is a class of cases where they have that opportunity, and they will do it. I had an example the other day, which was a most cruel case. The prisoner, who was tried before me, had been a prisoner in the Coldbath Fields Prison. A warder had reported him for talking to the other prisoners, and the man had been admonished in consequence. The warder was sitting down with his back to this man, who came up to him with a knife and stabbed him in the back of the neck, and very

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nearly killed him. If the wound had been half an inch either way he would have severed a main vessel, and it would have resulted in the death of the warder. The man went away, saying that he would teach the warder to report him, or something of that sort, that he should not report him for nothing. He was indicted for wounding with intent to murder, and for wounding with intent to do grievous bodily harm. The knife was a most formidable weapon; it was somewhat larger than an ordinary table-knife, and sharp at the point. The jury there would have been abundantly warranted in finding that the man struck the warder in that way with intent to murder him; they found him guilty of wounding with intent to do grievous bodily harm only. And whenever there is a count for wounding with intent to do grievous bodily harm, and the jury are told that they may find the prisoner guilty of unlawfully wounding, they invariably find the latter. I would appeal to any one conversant with the practice of criminal courts whether in one case out of 10 the jury find the greater crime where they can find the less.

193. (*Mr. Waddington.*) Has that been the case since wounding with intent to murder has ceased to be capital?—Yes; in my experience it has always been so where it has been open to the jury to say "Guilty of wounding with intent to do grievous bodily harm" or "Guilty of unlawfully wounding."

194. (*Chairman.*) The jury always find the lesser offence?—Yes; unless it is such a case that they cannot shut their eyes and senses to it.

195. (*Mr. Ewart.*) Therefore, you would not allow a jury to find extenuating circumstances?—I would not.

196. Not even if it were accompanied by the reasons for which they found them?—No; I think that the less the jury have to say the better. With juries, especially in the country, it would require a considerable amount of explanation to many of the jurymen to make them understand what an extenuating circumstance was, and I cannot help thinking that anything which multiplies distinctions, and the chances of escape to a criminal is much to be deprecated. A man, who says to himself, "I shall get off altogether," or "The jury will "acquit me on the ground of insanity, or manslaughter, or will at all "events find extenuating circumstances," has a greater temptation to the commission of a crime than he otherwise would have, and the deterrent is all the less.

197. (*Chairman.*) And with country juries the difficulty of their stating clearly and agreeing upon what the extenuating circumstances are, might in many cases be very great, might it not?—Very great indeed. I think that you might have some most lamentable scenes; you might have one man on a jury desirous of making a statement, and you might have discussions in the box, and things taking place which would make it almost impossible to carry the sentence of the law into execution, where the prisoner most richly deserved it.

198. (*Mr. Waddington.*) I suppose that upon the same ground you would object to dividing murder into two classes; one, deliberate murder, without any provocation or anything of that sort, and the other, murder where there was provocation, but not sufficient to reduce it to manslaughter?—I should on that ground, and also on another. I can understand that some impulsive murders without any premeditation are as bad, and that the disposition which made the man commit the murder as much requires checking as the most deliberate crime which ever was committed. I do not know whether you will remember a case to which I have adverted—but a man was going out, who was

no doubt a poacher, he had a bundle on his back; a policeman met him and said, "Halloa! what have you got there?" and nothing more; that man presented his gun to him, the muzzle of the gun touching him, and he fired; the shot did not actually enter into his chest, because I suppose the man swerved round a little, but it lodged in his arm, and afterwards he died. There could have been no premeditation in that case, but the disposition which prompted that man to commit the crime was one which as much requires checking as a deliberate disposition to acquire another man's purse, or to do him a mischief.

199. (*Mr. Hunt.*) There was the predetermination in that case to shoot any man who stopped him?—There was in fact, though that did not appear at the trial, because the counsel for the prosecution thought that it was of doubtful validity, and did not give it in evidence at the trial, but it was in the depositions. If there had been no evidence of it at all, I should have said that the act itself showed a determination of that sort.

200. (*Mr. Ewart.*) Do you not think that a very severe and peculiar punishment substituted for the punishment of death would have more certainty in its execution, than the punishment of death?—I should very respectfully ask what is the punishment proposed?

201. Supposing that there was a very severe and peculiar punishment, would it not have more certainty in its infliction than the punishment of death?—I cannot imagine any punishment of that nature.

202. (*Mr. Attorney-General for Ireland.*) Suppose you said the punishment of penal servitude for life?—As at present administered it is scarcely a punishment at all, in my opinion.

203. Suppose it to be absolute and universal?—I think not. While there is life there is hope.

204. (*Chairman.*) Do you think that it would be possible to carry out imprisonment for life; would not the criminal always imagine that some circumstances might occur which would shorten that imprisonment, and that in fact he would not be imprisoned for life?—I hope that I may at once be permitted to say, that I have no particular authority to speak upon this matter; but I cannot help thinking that prisoners are like all the rest of us, and that as long as we have any life in us, we have a hope of some change in some way or other happening.

205. (*Mr. Ewart.*) In the paper which you have laid before the Commission it is stated that we cannot rely upon the effects of a change from Capital Punishment to some other punishment in foreign countries, because "we do not know enough of the particulars to place "any dependence on the reported results"?—I think that I have so stated.

206. Are you not aware that in the debate on this subject in the House of Commons, authentic documents were quoted from America and other countries, which did show that the results were satisfactory in the case of the remission of the punishment of death?—I should like to cross-examine them.

207. You say, secondly, "We cannot rely on the effect of change in "our own country from Capital to some other punishment for offences "other than murder, because the *law* has never been altered till the "*practice* has been altered. If no man has been hung for horse "stealing for 20 years, or only one of 100 convicted, and then the "punishment is by *law* abolished, it is idle to compare the amount of "crime for 10 years before the change of the *law*, and 10 years after." Are you aware that returns were made to the House of Commons

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which give the commitments for five years before the last execution, and for five years immediately following, and that the result is that during the five years ending with the last execution the number of persons committing these crimes, which were no longer capital, was greater than those during the five years immediately following the abolition of Capital Punishment?—That is a remark which I meant to make. During the five years ending with 1832 there were only 196 persons executed out of 7,276 committed.

208. The commitments in the time subsequent to the abolition of Capital Punishment are fewer, are they not?—Yes; but I say that the law had been altered in practice.

209. That return is dated from the time of the alteration of the practice?—There was one execution, but I suppose that, although you speak of the last year of an execution, there had not been for many years previously many executions. Take the case of horse stealing; I have no recollection of it myself, but I have understood that every now and then a man used to be hung for horse stealing.

210. (*Mr. Neate.*) That was under circumstances of aggravation, I think, or when a man had set fire to the buildings after he had stolen a horse; but it was not very unusual to hang for horse stealing where you found circumstances of aggravation?—If that man was put down as hung for horse stealing, and if practically the punishment for horse stealing had not been capital for 10 years preceding that time, it is of no use comparing the five years prior to that execution with the five years afterwards. Then there is another thing which I will endeavour to point out. I can very well understand that where the conscience or feeling of the public is not in accordance with the infliction of Capital Punishment, as for instance in forgery, they would do everything that they could to let the man off. Then the additional chance of escape which that gave might tempt to the commission of the crime, but it is a very different thing when you contrast that with the case of a crime where Capital Punishment, in my firm belief, is in accordance with the public feeling.

211. (*Chairman.*) Then we gather that you very seldom have found juries acquit men of murder, because they were averse to the infliction of Capital Punishment?—My own experience is so.

212. (*Mr. Neate.*) But the question is whether the juries do not require a higher degree of evidence. I will assume that the jury are perfectly prepared to convict if they are sure of the prisoner's guilt, but do not they require a higher degree of evidence in the case of murder than they do in any other case?—I should think that they do, and rightly so, because, inasmuch as the crime is the most hateful which can be committed, so is it the most improbable, and so ought it to have the greatest amount of evidence. I think that one may freely admit that in all probability there would be more convictions for murder than there are now, if the punishment were not Capital, but the question is whether the number of improper acquittals now is such that the law is an inoperative one, or not so good as it otherwise might be.

213. But you, speaking as a Judge, admit that a higher degree of evidence should be required for the conviction of murder than for other conviction?—So I should say, if the punishment were only penal servitude for life.

214. It is not with reference to the punishment, but with reference to the heinousness of the crime?—It is not with reference to the punishment, but with reference to the improbability of the crime.

215. But upon the whole you would not suggest any different definition of murder, or any different classification?—I should be very

glad if there were a different definition of murder, because the present definition very frequently gives counsel a sort of pretence for making a speech to the jury, which they really have no right to do, saying that the jury must find that there was some actual malice, in a way which is not necessary, and then the Judge has to correct that by telling the jury what the real law is. The consequence is that he appears to be making a speech against the prisoner, when he has not the least wish to do so. If a code were being drawn up, I should say that it would be as well to alter that definition, but whether it is worth while otherwise, I will not say. I have not thought upon the subject.

216. There is nothing which is now legally murder, which you wish not to be murder ?—I have some hesitation about that. At present, if life is taken away under heat of blood occasioned by a blow, it will reduce the crime to manslaughter, as we all know ; so also, if a man kills another, whom he finds committing adultery with his wife. It seems to me that if a slight blow may justify such heat of blood, that killing the offender is only manslaughter, surely if within 24 hours a man were to rush upon a person who had committed adultery with his wife, or with respect to whom he had good information without having seen it, that adultery had been committed upon his wife, one would think that that ought to be sufficient provocation. I think that that would be a good alteration ; but whether it had better be made, or whether the evil had better be left to the remedy which it now receives, I do not know.

217. (*Mr. Waddington.*) Is that the only provocation which you would suggest ?—It is one which occurs to me upon the question put to me. I dare say that I could think of others.

218. You have said that you would not admit of provocation produced by violent words and a sudden quarrel, as taking murder out of the first class and putting it into the second and diminishing the punishment ? —I think that I did not say so. I think that I said that I would not divide murder into two classes. One could put other instances. If a man's mother had a very offensive charge made against her, surely it is a greater provocation, one would think, than a trifling blow.

219. (*Mr. Neate.*) Can you suggest any way in which the amount of such a provocation could be defined, or would you leave it to the jury in every case to say whether there was such provocation as reduces the offence. You must either give a legal definition of the provocation as you have now, or leave it to the jury to say whether there was such a provocation as reduced the offence ?—I really have not thought upon the subject.

220. (*Mr. Hunt.*) In a case of such provocation as has been alluded to, under present circumstances the jury would I suppose recommend to mercy, and the Judge would forward that recommendation to the Home Secretary ?—That is a practical remedy.

221. And in such a case where the jury recommend to mercy, and the Judge backs the recommendation, I suppose there is no instance known to you of the law having been carried into effect ?—I do not know of any, but it is not my own practice to say that I think mercy ought or ought not to be exercised. I am speaking under Mr. Waddington's correction, but I think that I endeavour to state what the facts are, and never to offer an opinion as to whether mercy ought or ought not to be shown.

222. (*Mr. Attorney-General for Ireland.*) That is not the usual course which Judges pursue, is it ?—I think so.

223. (*Mr. Neate.*) You think that the law with reference to provo-

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cation is capable of amendment, although you have no amendment to suggest?—I would rather say that I do not feel able to express an opinion upon the matter, for I have not formed one, and I should not like to give crude notions to the Commissioners upon a matter on which I have not thought.

224. (*Mr. Hardy.*) I still understand you to go as far as this, that inasmuch as a blow to a person causing heat of blood reduces the offence, so in cases of a similar kind, of an equal or greater amount of provocation, your view would be to reduce the offence also, if it could be done?—One would think that to be reasonable, but the difficulty which I see is in a definition which should not include cases which ought to be included, and which should not include so much that in every case the jury would have an opportunity of letting a man off who ought not to be let off. For instance, you might give the definition that wherever, in the opinion of the jury, the provocation had been such that a man of ordinary goodness of disposition might have struck such a blow as caused death, they might find a verdict of manslaughter only, but then, of course, there never would be a case, or very rarely would be a case, where a man might not have a chance of escaping who ought not to escape.

225. (*Mr. Waddington.*) That of course would not apply to a murder committed in the perpetration of a felony, or of a highway robbery?—No.

226. Nor would it apply to deliberate cases of poisoning, and so on?—No.

227. It would not apply to any of the worst cases?—Such a general qualification as I have mentioned I should think would not.

228. (*Mr. Attorney-General for Ireland.*) Have you considered the question at all whether in criminal cases there should be a new trial allowed to the prisoner under any circumstances?—I have.

229. What is your opinion upon that subject?—Again I speak with great embarrassment, because I am afraid that I shall detain the Commission some time to explain myself. So long as the Queen has the prerogative of pardon, which one would be very sorry to see taken away from her, there always will be a court of appeal, because she may be asked to pardon as a matter of grace, and she may be asked to pardon on the score of mistake. You cannot take away from her that jurisdiction, which one never wishes to see taken away. One cannot help feeling that the court of appeal as at present constituted, except that it has one of the best Judges which such a court can possibly have, is the worst court which can possibly exist, because it is not a public court—I mean the Secretary of State for the Home Department; and except that the Secretary of State is always so fit a man, and is always so ably advised, I say unfeignedly that it is the worst court which there can possibly be; it is no court at all in reality, but practically it is a tribunal of appeal; it is private, it proceeds upon written statements and upon *ex parte* statements, it does not hear the other side, and therefore no doubt there is very great difficulty in saying that it is a satisfactory tribunal to which to appeal from the judgment of a jury, and yet you cannot get rid of it. But, on the other hand, you cannot have a court of appeal without augmenting that uncertainty, which it is so desirable to diminish, and without giving more chances and more hopes; and you cannot have it without doing what it is also most desirable to avoid, namely, worrying prosecutors. At present people are very reluctant to prosecute, and I suppose that a very great number of offences go unprosecuted, and there are continued applications made to magistrates

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to dispose of the case summarily; but nevertheless a certain amount of that business comes before the ordinary tribunals, where cases are tried by jury. But if you had a court of appeal you must properly have the prosecutor, or somebody representing the prosecutor, to take part in the transaction. The reluctance of prosecutors would therefore really be greater than it is now; and I think that that is very much to be deprecated. If such a thing existed, it could not exist except upon the terms of some public prosecutor taking the matter entirely out of the hands of the private prosecutor, who would be likely to be tampered with, and who would otherwise be reluctant to interfere in the matter. In addition to that, there would be a great deal of trouble and expense, and I cannot help thinking, for my own part, that inasmuch as a court of appeal is not what one may call a natural thing, that is to say, is not a thing of necessary existence, there is no more reason why there should be an appeal to one court above than to another court above it, and so on; and inasmuch as people in England are never convicted, except, in my judgment, upon the very clearest evidence, I cannot help thinking that any advantage to be gained from the establishment of a court of appeal, although theoretically more perfect than the one which now exists, would not compensate for the disadvantages which would be attendant upon it.

230. (*Chairman.*) And that is always considering the court of appeal to be one on the part of the prisoner and not on the part of the prosecution?—So I understand. It has never been proposed that there should be a court of appeal on the part of the Crown. I certainly do not see that the one necessarily leads to the other.

231. (*Mr. Hardy.*) Could such a court of appeal as that to which you have been referring, ever in any sense occupy the place which the Home Office does. Of course it must be within a certain time that the new trial must take place, you could not have it pending for months?—Just so.

232. (*Mr. Waddington.*) If new facts were discovered six months after the trial you would not apply for a new trial?—No; and then again, the present appeals to the Home Office are very much mixed up with considerations of grace as well as of innocence.

233. (*Chairman.*) There would still be a final appeal to the Sovereign?—Even then there is no reason why should you not ask for a pardon, and in asking for a pardon, I suppose that it might be put upon the double ground of innocence and of insufficient evidence to convict.

234. (*Mr. Attorney-General for Ireland.*) Then you do not see anything to suggest in the way of a change of the existing system as to the revisal of sentences?—No; nothing occurs to me.

235. (*Mr. Waddington.*) It has been suggested that the Secretary of State, if new evidence were brought forward which he thought of value, might be enabled by an Act of Parliament to direct a new trial, or to direct a motion for a new trial in the Court of Queen's Bench. Do you think that that modified sort of new trial would be desirable; it is quite an anomaly in the law?—That certainly is one of the great objections in the law, that if new evidence is discovered the only way of giving the prisoner the benefit of it is not to try him over again, which would be the natural mode of proceeding, but to pardon him, that no doubt is an objection. One does not very well like to use the expression that it works well, if one sees a theoretical objection to it, but I cannot see that there is any such existing mischief that it is worth while to attempt to get rid of it by bringing about the mischiefs

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which, I have said, would follow from anything like the establishment of a regular Court of Appeal.

236. (*Mr. Ewart.*) Would not a great many of the objections to it be removed by the remission of Capital Punishment?—No.

237. Are not those the peculiar cases which generally give most trouble?—No; I think not.

238. Are there not incessant applications to the Home Office, of all sorts, in cases of life and death?—There are, which seems to me very much to corroborate my notion that that is what people care for more than anything else.

239. (*Mr. Hardy.*) Capital cases of course attract very much more attention, and they are obliged to be decided upon immediately, before the sentence is carried out, but I suppose that within your knowledge cases of all sorts are continually flowing into the Home Office?—Yes, continually.

240. (*Mr. Neate.*) Your view supposes that there will always be Home Secretaries, able and willing to take this burthen upon themselves?—I have no doubt that the House of Commons will take care that we shall never have an inefficient Home Secretary.

241. Do you not think that this peculiar duty might prevent some persons from being Home Secretary; do you not think that there are some persons who would shrink very much from this burthen?—No; I never heard of such an instance. I have disclaimed any particular qualification to speak upon most matters, and I certainly disclaim it very earnestly to speak upon that.

His Lordship withdrew.

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The Hon. Sir SAMUEL MARTIN, one of the Barons of Her Majesty's Court of Exchequer, examined.

242. (*Chairman.*) Has your Lordship had considerable experience at the Bar, as well as on the Bench, in criminal matters?—Not at the Bar in criminal matters. I was very seldom in a Criminal Court.

243. But on the Bench you have had many years experience?—Yes, fourteen.

244. And you no doubt have turned your attention to the subject of Capital Punishment?—I have.

245. Have you formed an opinion upon the desirability of its abolition or retention?—I do not think I have such knowledge as to enable me to give an opinion. I have thought a good deal upon the matter since I received a letter from the Secretary of this Commission, and I am myself satisfied, as I stated in the letter which I wrote to him in answer, that for the purpose of forming a real judgment upon the efficacy of Capital Punishments you must have recourse to persons who are well acquainted with the lower classes in this country, and that no man who is not, is competent to give an opinion upon the subject. It very seldom occurs that any person in the middle class of life is indicted for murder. In my experience there have been but two; one of them was Townley, whose case was so much discussed last year, the other was a man who had been in the service of the East India Company and had returned and settled in Durham. I do not exactly recollect in what service he was when in India, but he was in some respectable service. So far as I recollect those were the only two persons in the middle class of life who were ever tried before me, and I certainly do not think that in either case the circumstance of the crime being punishable with death or not would have operated. In respect of Townley's case, I believe that his

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act was in consequence of the murdered young lady making a communication to him which hurt his feelings very much, and that it was done upon the spot, and probably was not contemplated until immediately upon the supposed provocation being given. The other case was a case of alleged poisoning of a wife, and I cannot think that it would at all have operated upon the mind of that man whether he was to be punished by death or by penal servitude for life, or by any other punishment which might be substituted for it. I am satisfied that, if he was guilty of the offence, he would not have been deterred from it by knowing that his execution would follow a conviction. But with respect to the lower classes my idea is that it must be a terror to them, that in the event of their committing murder they will be punishable by death, and by a public execution.

246. Is there a striking effect upon those who are in Court at the time of the sentence ?—Yes, there is ; a sentence of death has a most serious effect upon all the people in Court ; you have perfect silence, as perfect as can be, all the people seem very much interested in it, and the sentence does create a very strong impression upon the persons present.

247. More so, probably, than if the sentence was penal servitude for life ?—Very much so. I should think beyond all measure more. I am satisfied that people would not regard the sentence of penal servitude for life in the same manner as they regard the sentence of death, and it is not delivered with the same solemnity. I do not know whether you have ever been present when a prisoner was sentenced to be executed, but it is a very solemn proceeding. In the first place, in all cases of felony, the prisoner is called upon to state whether he has anything to say why sentence should not be pronounced upon him, and in an ordinary case of felony one cannot conceive a more common place proceeding than it is—it makes no effect upon any one ; but in the case of murder, generally speaking the officer is very careful how he calls upon the prisoner, and it has an effect, and a very great effect. I am not sure that I ever heard in my life a more solemn proceeding than when the late Mr. Sidney Gurney used to call upon persons convicted of murder. Then, in cases of murder, and in no other case, the crier makes a proclamation for silence, which creates a great effect upon the bystanders ; this is not done in the case of penal servitude for life. If penal servitude for life be substituted for Capital Punishment, I have no doubt that something of that sort should be done for the purpose of making it as solemn as the sentence of death. There is no other sentence pronounced which has at all the same effect upon the bystanders as the sentence of death. I think I can say that with the most absolute certainty.

248. (*Mr. Neate.*) Do not you think that the fact of the punishment being greater induces a much greater attention on the part of the public to the circumstances of the trial, and that the circumstances of the trial are read with very much more attention ?—I have no doubt of it.

249. Do you not think that that has the effect of familiarising the minds of the people with the details of the commission of crime, and that they get familiar with the way in which a murder is committed ? That it causes the minds of persons who either are criminals or intend to be criminals to dwell upon the details of the particular murder, and so to become familiar with the idea, and have you not noticed that at the time of any remarkable trial for murder there are sure to be three or four murders just at the same time ?—I have heard it so said.

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250. Since the murder by Müller, there have been four or five murders?—I have heard it said (and very likely it is true) that when a murder has been committed of a peculiar kind there are persons who imitate it, that they have the thing suggested to them and do the same thing.

251. It leads them to dwell upon the way in which one man takes the life of another?—It is very possible.

252. (*Mr. Attorney-General for Ireland.*) Have you any opinion of your own as to the deterrent effect of Capital Punishment as compared with other punishments?—So far as my experience goes, I cannot say that I have ever conversed with persons in the lower class of life so as to ascertain what comparison they draw between penal servitude for life and the punishment of death, but I cannot doubt that taking away life must create a great deterrent effect.

253. (*Mr. Ewart.*) Do you think that the sentence of Capital Punishment is as certain of execution as if it were penal servitude for life?—If you wish, I will answer that question now, but I expected to be asked some questions with reference to the alteration of the law. I have no doubt that some alteration must be made in the law, and that you must either restore the old power of the Judges of causing sentence of death to be recorded, or otherwise alter the law. Nothing can be more objectionable than sentencing in the most formal way persons to be executed, when many of the public are perfectly aware that the sentence will never be carried out.

254. (*Mr. Waddington.*) The alteration to which you allude is the one which was introduced in 1861?—Under an Act of Parliament called Mr. Greave's Act.

255. What change do you propose in the law itself?—My view is, that, if possible, constructive murders should be done away with, and that it should not necessarily be a murder because a man killed another whilst he was committing a felony. Suppose a man intends to pick a pocket, and is picking a pocket, and that suddenly, without any intention whatever of killing the person whom he is robbing, there is some circumstance which induces him to strike a blow, and it is followed by death, I believe there is no doubt that is murder. I think that should not be murder, or that, if it be, a Judge should not be under the obligation of sentencing the man to be executed. I have read the document which the Secretary sent to me from the Attorney-General of Massachusetts, and I think that the definition there given of murder would not answer in this country, but I think that substantially either something of that sort should be done, or the old power should be given to the Judges. Baron Bramwell has been before you, and he has a great objection to a Judge having any discretion whatever upon the matter; but discretion must be somewhere. And I cannot think that it is a proper state of things, when a murder takes place of the character which I have mentioned, instead of the Judge having power to interpose, it must go up to the Secretary of State.

256. Supposing that the distinction were made by the law itself, upon what principle do you think it ought to be made—would you leave deliberate murders, that is to say, murders which resulted from a deliberate previous intention, to be punished capitally, and other murders, such as those caused by provocation at the moment, without any deliberate premeditation, to be punished by a secondary punishment?—That is partly my idea.

257. (*Mr. Neate.*) Take a case of murder with very great provocation?—If the murder is a premeditated murder (and by "premeditated"

I understand a thing thought of beforehand, a thing which has been the subject of previous consideration in the mind of the person doing it), I can conceive cases of provocation where one would desire that the man should not be executed, but I should continue that as murder. If there was a deliberately premeditated killing with malice aforethought, by which I understand a determination in the man's mind, thought of before, I should continue that as murder. But the classes of murder which I think ought not to be continued are such as I have mentioned to you, where there is no intention to kill at all, and, if I may say so, the killing is accidental, but by reason of the person being engaged in a transaction with which taking away life has nothing to do, a forced construction is put upon the act, though there is no intention to commit the act.

258. (*Mr. Waddington.*) Would you make the intention to take away life necessarily an ingredient in the cases of murder to be punishable with death ?—If it were possible to frame a definition of murder so as to exclude such a case as I have mentioned to you, I should desire to see it, but whether such a definition can be framed or not is, I think, a very doubtful matter. For instance, I think that this should continue to be murder. Suppose two men are walking in the street, perfect strangers to each other, and that one of them, being a man of sound mind, either from temper or hatred of mankind, stabs the other ; there is no deliberation there in the sense in which we have been speaking of, and there is no malice aforethought, for he knows nothing of the man, and it is done more from a general malignity and ill will than hatred of the particular man. I think this act ought to be punished with death, if the punishment of death be continued ; and I think that no definition would be right which did not include this case, but the words of the Law of Massachusetts it seems to me would not include it.

259. That case would not be capital by the French law at the present moment, except accompanied by some crime ?—I do not know, but I should say that if the punishment of death is to be continued, men should be protected against the act of a savage inflicting death in that way without any provocation upon an innocent bystander. I think that ought to be murder. The definition in Massachusetts is this : "Murder committed with deliberately premeditated malice afore-"thought." That is the first definition given of murder ; that is, murder of the first class ; it goes on to say, "or in the commission of "or attempt to commit any crime punishable with death ;" but in Mr. Foster's letter he states that the words "deliberately" and "pre-"meditated" are not interpreted by the Court to have so much force as on the first reading seems to belong to them. Now that is the very evil which it seems to me should be avoided in this country, not to have a meaning forced upon words which they do not ordinarily bear. If the Judges in Massachusetts do this, they are introducing implied malice, and they seem just to be raising up that which many people here think ought to be got rid of. I can mention an instance in which very serious inconvenience arose in respect of this matter of constructive murder. There was a man who was tried for murder ; he was a German; he had committed a robbery in Oxford, and came to London, and then got away to Hamburg. The robbery was taking a carpet bag out of the travellers' room in an inn. It turned out that there was a large sum of money in it. The sum was so large that it was important for the owner to get it back. The man was traced to Hamburg, and a detective officer sent out after him. Upon arriving at Hamburg it was found that there was no international treaty, and

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that consequently there was no power to apprehend, and a thing was done which I certainly think ought not to be repeated. The English policeman got into communication with the police at Hamburg, and they persuaded the man to surrender and come over to England, and it was perfectly plain that he had given himself up on a solemn pledge that he would be treated with civility and that no indignity would be offered to him, that he would be brought to this country and simply tried for the offence of stealing. The man came on board an English steamer at Hamburg, and the very instant he came on board he was seized and shackled, and irons put upon him, and he was carried down below and put in prison. He complained very much of the breach of faith which had been committed towards him. I think that this was upon the Friday or Thursday, and on the Sunday afterwards, whilst upon the voyage, he contrived to reach a carpet bag which he had, with his shackled hands, took out a pistol and fired it at the policeman; the result was that the policeman died, and the man was tried for murder. He was tried before me and another Judge at the Old Bailey, I being the person trying him; we differed as to what was the proper direction to the Jury. The other Judge who sat with me was of opinion that the proper direction was that the man was in lawful custody, and that the shooting of the policeman was necessarily murder, and that the only question to be left to the jury was whether or not the jury believed that the man fired the shot, and that death was the consequence of it, and that if they did, he was guilty of murder. I thought it was not so. I had great doubts, and have great doubts now, whether that man was in lawful custody. The consequence was, that having differed upon it, we both agreed that the trying Judge must act upon his own opinion. Accordingly I left the question to the jury in the way which I thought correct, but we differed upon the point, and that Judge to this present hour thinks that my direction was wrong.

260. (*Mr. Neate.*) Was the verdict in that case manslaughter?—No, it was murder, and the man was executed. The jury found that the shooting was for the purpose of revenging himself upon the policeman for the supposed breach of faith, and at the request of Mr. Waddington, there being another case, if I recollect rightly, raising pretty nearly the same point, a case was stated for the opinion of the 15 Judges, who were of opinion the if the act was done for the purpose of revenging himself upon this man for the supposed breach of faith, it was an immaterial circumstance whether he was in lawful custody or not, and that it was murder, and the man was executed.

261. (*Chairman.*) Are you aware that Mr. Baron Bramwell gives the following opinion in a letter which he has written to this Commission? He says, "Some unpremeditated murders are as bad as the "most deliberate, and the disposition which gives rise to them as "much requires control." Then he gives a case. He says, "A man "going poaching has a bundle on his back. A policeman, without "touching him, says, 'What have you there?' and is shot, and dies, "without further cause or provocation."—That is something similar to the case which I have mentioned of two individuals being in the street, and one killing the other without any provocation or other cause beyond indulging in a brutal and savage disposition, and being utterly reckless of what is the consequence, and whether he takes life or not, and that suggests the difficulty of a definition.

262. (*Mr. Hardy.*) As I understand you, you would say that there must be an intention to kill. Suppose that there is an intention only to do harm, such as shooting at a man's legs, and he dies?—Sup-

posing that a poacher or a keeper fired upon a man merely with the intention of wounding him, I should not like any definition excluding that case, it is probably not a case where I should execute the offender, but I should not like any definition excluding it. I think that it would be very dangerous.

263. (*Chairman.*) Then you would leave the law upon that point as it is at present?—Yes. The species of killing which I think ought to be, if possible, removed from the definition of murder, is the case of persons who are engaged in an act not at all contemplating any injury to life but in the course of it a circumstance suddenly arises which leads to the taking away of life. I should be glad if that case could be excluded from the definition of murder.

264. (*Mr. Hardy.*) There was the case of the burglary at Frimley, where a man was robbing without any apparent intention to use violence; he had a pistol with a marble it, and he shot a clergyman?—It strikes me that all that can be said with respect to the matter is, that there will be some cases very nearly approaching murder, and there will be others very far away from it; and if you take both extremes you will get what you may call a comparatively lenient offence upon the one hand, and you will get a very atrocious one on the other.

265. Should you be inclined to give the jury any power?—I should not, because my belief is that if you introduced anything into the English law like that which exists in France, of murder under extenuating circumstances, except in a case where there was some strong popular feeling, or something very much out of the way, that would be the general verdict, unless the law was altered as to the unanimity of juries.

266. (*Mr. Waddington.*) With respect to an intention to kill. Suppose that a man ravished a very delicate woman, and killed her without any such intention, his only intention being to commit a rape?—I should not have that murder. In the case of a man committing a rape, and in consequence of it, or in the course of it, a delicate woman dying, I should not treat that as murder.

267. The intention to kill would be the great criterion in your view?—Certainly, the intention to do grievous bodily harm from which death might probably follow would be my criterion.

268. The law would infer an intention to kill from that?—Yes. If a man went and beat another, and intended to beat him to the very point of death, but to leave off then, and the man died, I would not desire that not to be murder, at least I should not wish the law to deem it not to be murder, merely because the man had hoped that he would beat the other only, and so escape killing him, and thereby avoid Capital Punishment.

269. (*Mr. Neate.*) Do not you think that it might be important to make a distinction, which would very much tend to the security of life. For instance, with burglars, if there was no distinction between killing a man and knocking him down, and his afterwards dying, a burglar would always take a pistol and not a bludgeon. If there was a distinction between the two cases, the burglar or the highwayman would take a bludgeon, because it would answer his purpose of disabling a man, and although the man might die, yet if he did die the offender would not be hanged for it; but if you did not make any difference between an apparent intention to kill, and an apparent intention not to kill, the burglar and the highwayman would always use a pistol or some deadly weapon?—That may be, but with respect to burglary, burglary is a very great sounding word, but the majority

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of cases of burglary are as little heinous offences as well can be. The great bulk of burglaries consist in people being hungry, and seeing a window open or easy to be opened, put in their hands, or get in themselves, and take away some food or articles of clothing, and it is very seldom indeed that you have a case of real burglary, such as you are mentioning.

270. (*Mr. Hardy.*) At one time you will remember that nearly every house in the West Riding was attacked, and people were constantly very much injured; there was a gang of 20 or 30 men who were gradually transported and disposed of?—That must have been before my time as Judge. I have known the Yorkshire Assizes a good deal for the last 14 years in that capacity, but there has been nothing of that sort to my recollection. The only great Yorkshire burglary which I recollect was the case of Mr. Bradley, near Sheffield, at the Manor Oaks.

271. (*Chairman.*) You would suggest that the sentence of death should never be passed, except it was carried out?—That is my opinion, that the sentence of death should not be passed, except the Judge passing it intends that it shall be carried out. I think that sentence of death should not be passed in a formal way, except the Judge then has the firm determination that, as far as it rests with him, that sentence shall be carried out.

272. (*Mr. Waddington.*) Would you be satisfied with the law as it was before the passing of the late Act, leaving the Judge the power to record the sentence?—I have a very great difficulty in arriving at the conclusion that there can be a new definition of murder made, and I am afraid that great evil will arise if a new definition is made. You have 15 people to act upon it, they are men of different minds and I am certain that you would find that if there was a new definition of murder discrepancies would arise in the construction put upon it by different Judges. That would be a great evil. I also think that it is an evil to alter a definition which has existed so long as from the time of Lord Coke. I do not believe that people have been executed in the last 20 years who ought not to have been executed, assuming the law of Capital Punishments to be right. I think that good effect would arise by giving a Judge the power which he formerly had of causing sentence of death to be recorded.

273. Leaving the rest to the Secretary of State?—I believe that practically it was done by the Judge; he directed sentence of death to be recorded, and in the Associates Book he directed to be written down what punishment he thought the proper one, and I believe that the Secretary of State always acted upon it.

274. That was in all cases except murder, in all other cases it was a matter of course?—There were cases where sentence of death was recorded, for instance, for bestiality; until very lately the punishment for that offence was death. The Judge directed sentence of death to be recorded, and when he signed the calendar he wrote opposite the man's name what he thought the proper punishment, and I believe that it was carried out.

275. (*Mr. Neate.*) I understand you to say that you believe that the present definition of murder, whatever be its origin, has been applied to cases to which it ought not to have been applied; in fact, I understand you to say that you do not agree with the dicta of many of your predecessors?—You must take it to be as old as Lord Coke. If I had lived and had had any influence at the time when Lord Coke lived and wrote, and possibly when Mr. Justice Foster wrote, I should

possibly not have deemed to be murder what is laid down as murder; but the law as laid down is binding upon the Judges.

276. Lord Coke's definition, I think, is at variance with the existing law; he substitutes "unlawful" for "wilful" in the definition "wilful "murder with malice aforethought"?—I looked at Lord Coke's definition before coming here; he states "whether the malice be express "or implied." It is nothing more than the law of Lord Coke, but his law is law, and I take it that every Judge must act upon it.

277. But does not he leave out the term "wilful" and substitute "unlawful" for it?—If I recollect rightly it is the killing of a person within the Queen's peace with malice aforethought, whether it be express or implied.

278. But he leaves out the word "wilful"?—I believe the word "wilful" is not in the definition. If you have any book on criminal law you will see.

279. (*Mr. Waddington.*) The word "wilful" only means to distinguish it from accidental, does it not?—I apprehend so.

280. (*Mr. Attorney-General for Ireland.*) You have no notion of a new definition in terms?—I endeavoured to write one, and utterly failed in getting it to my satisfaction. I took the Massachusetts law, and I was satisfied that it would not do, and I tried to make a definition, but failed.

281. However, if such a change in the law is practicable, you think that it ought to be made?—Yes.

282. (*Chairman.*) Of reducing that crime?—Yes, or not compelling the Judge to pronounce sentence of death in the formal way in which it is done, except there be in his mind at the time the determination to carry it out, unless some new circumstances occur. Of course, that does not interfere with the Secretary of State at all; he may do what he chooses; but I think that there ought to exist in the Judge's mind the intention that the execution shall take place before he is called upon to pronounce sentence in a formal way.

283. (*Mr. Attorney-General for Ireland.*) That would involve the restoration of the power of recording sentence of death in some cases, because there will be some cases where the Judge will differ from the jury, he may think the evidence insufficient?—Generally speaking, the jury are not likely to find a man guilty of murder, except it be a murder. I never knew such a case but one. A woman was indicted for the murder of a child; it was so unlike murder that I thought it was not necessary to occupy much time about it. It was a case of manslaughter, and I thought that the jury would at once have found her guilty of manslaughter, and accordingly I summed up in a very few words. I was very much surprised at the jury desiring to retire; they retired for a couple of hours, and they returned with a verdict of guilty of murder, at which I was greatly astonished.

284. (*Mr. Waddington.*) I think that in that case the sentence was commuted to a short term of imprisonment?—Yes, I wrote to you the same night, and I saw you, I believe, afterwards in London upon it.

285. (*Mr. Attorney-General for Ireland.*) What does your experience lead you to say with reference to the repugnance to Capital Punishment causing verdicts of acquittal to be given by juries?—I do not think that it does. My notion is that juries almost always find a correct verdict, that they are as good a tribunal as can exist, and that they find an honest verdict upon all occasions. Of course if there is any reasonable ground for finding a man guilty of manslaughter instead of murder, where their passions are not excited, they will do it. I have not had the slightest difficulty in getting jurors to find proper verdicts.

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286. (*Chairman.*) You think that they are not deterred from finding a man guilty of murder from the knowledge of what will be the effect of it?—Not at all. I think that as a general rule they do what is right and proper, I think that they are very much disposed to follow what the Judge suggests to them, that they will apply themselves to what he desires them to do, and give an honest verdict.

287. (*Mr. Attorney-General for Ireland.*) You think that they are not more disinclined to find a verdict of guilty in a capital case than in another?—I think not, but the counsel, the Judge, and the jury are always attentive in a capital case, and I think that weight is given to everything to which it ought to be given, both in the way of convicting the prisoner and in the way of acquitting him.

288. (*Mr. Waddington.*) Of course there are peculiar difficulties surrounding the proof of a case of murder, there is the absence of the prosecutor to begin with?—That is so, but I should say that generally in cases of murder, the evidence is very clear.

289. (*Mr. Neate.*) In cases where you would give the Judge the power of recording sentence of death it is only another way of saying that the offence shall cease to be capital?—Yes.

290. Your remedy is to increase the discretion of the Judges?—Yes, unless you can find a definition, but I think that it is almost hopeless to attempt to frame it.

291. (*Mr. Waddington.*) You would recommend an alteration of the law if you thought that it could be done clearly and distinctly, but thinking that impossible, you would leave it to the Judge?—Yes, I think it a very unfair thing for the Secretary of State to have perpetually put upon him the remission of the punishment of death, nine-tenths of the community do not at all understand it; they only know that a man has been sentenced to be hanged in the most formal way possible, and the next thing which they hear is that the Secretary of State has commuted the sentence; and when such a case as Townley's occurs, it is supposed that the remission is from some motive of favour, and they are tempted to look upon the conduct of the Secretary of State with suspicion.

292. (*Mr. Ewart.*) Do you think that crimes capitally punishable are likely to meet with as certain punishment as crimes not capitally punishable?—I think so. I never found any difficulty with the jury.

293. Is it not probable that they do not, taking all the chances of escape from beginning to end, the jury, the Home Office, the public feeling, and so on?—My own impression is that it would make no difference. There is certainly one case of murder, which is probably the most common case which occurs, and that is child murder; I would certainly suggest that an alteration be made in the law with respect to the child being completely born.

294. (*Mr. Waddington.*) That is a case in which you think it particularly desirable that the Judge should have the power of recording the sentence?—Yes; any Judge who pleases can at once get an acquittal for a murder of that sort. It is almost impossible to tell whether the wound was given before the child was separated from the mother or afterwards; there are no means of getting at it, and if you suggest to the counsel for the prosecution, "Have you any means of showing that "this wound was inflicted after the child was separated from the "mother," the counsel says, "No," and there is an end of it; that is not a very satisfactory state of the law.

295. (*Mr. Hardy.*) You think that there should be some intermediate offence between murder and concealment of birth?—Yes.

296. (*Mr. Hunt.*) Making it immaterial whether the child was completely born or not?—Yes; I think that some punishment short of death should be provided for that offence.

297. (*Mr. Attorney-General for Ireland.*) Do you mean for infanticide generally, or for infanticide in the act of birth?—In the act of birth; an infant is found just as it is born with some wound, and no one can doubt that it was inflicted by the mother, but cannot tell whether it was inflicted before or after its complete separation from her. Then, as to concealment of birth, the rule which one lays down is that if you believe that the child has been unfairly dealt with, you give a heavier punishment, than in the case of a young woman, who, the child having died, puts it in a secret place to conceal her shame, that is a very lenient offence. I think that I once gave penal servitude for a considerable period.

298. (*Mr. Hardy.*) The punishment is only two years imprisonment, I think, for concealment of birth?—Then this woman must have been convicted of something else. She was a girl convicted at Lancaster, she was a servant at Fleetwood or Blackpool.

299. (*Mr. Waddington.*) She was convicted of manslaughter?—I know that I gave her a very severe punishment. She was a servant, and had been living with an old lady, who had no suspicion whatever of her condition. This lady was a very old person, and the girl was ill and in bed, and the old lady brought her up a portion of her own dinner, and brought her a knife and fork to eat it with. The girl took the opportunity of the old lady going down stairs to cut the child's throat right across with the knife which had been brought up to her to cut her dinner. I gave her a very severe punishment, and her friends applied afterwards to the Home Office for a remission of the sentence, but the Home Office would not grant it.

300. (*Mr. Neate.*) Have you ever considered whether women, under any circumstances, should be capitally punished, supposing you retain Capital Punishment for men?—I should think so. Take the case of Mrs. Manning. If you are to retain the punishment of death, there is no doubt that she was the most guilty person in that case. I should not relieve women expressly from the punishment. I believe that in practice many women are not executed, but nevertheless I would not have any law relieving them from the punishment of death.

301. (*Mr. Attorney-General for Ireland.*) There is another question, namely, as to the hanging of children?—The law draws a line with respect to that, and I do not think that I would interfere with it.

302. (*Mr. Hunt.*) Have you formed any opinion as to the expediency of having executions in private instead of in public?—I have read what has been written to the Commissioners, and I have read the article in the "Times" newspaper, which was published after Müller's execution, about a fortnight ago, and I am for a public execution. There was a horrible scene reported to have taken place at Müller's execution, but I should think that that would only exist in London, and probably not there to so great an extent except in such a case as Müller's.

303. (*Mr. Ewart.*) Is it not the case that in the country women and children, for instance, are not allowed to go?—I do not know; they do exclude women and children from being present in certain cases in court, and if it could be done at executions it might be desirable.

304. (*Mr. Neate.*) If women are to be hung they ought to see what it is?—Perhaps so. I should think that the first question which you have to consider is whether or not the punishment of death should be retained. Although philosophically perhaps you may arrive at the

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conclusion that there would be the same result arising from other punishments, yet I do not think that in the present state of public feeling the punishment of death could be abolished. I do not think that public contentment would have been given if Müller had not been executed. I also think that in the case of Mrs. Manning public contentment would not have been given if she had not been executed; but I certainly think that it ought to be confined to cases of what I call real murder.

305. (*Mr. Hardy.*) Do you not think that there would be a likelihood of lynch law if the punishment of death was abolished?—It is very likely that people would revenge themselves. I think that there is a public feeling in favour of real murderers being punished with death.

306. (*Mr. Neate.*) Then you would rather continue the punishment out of deference to popular feeling than from your own views?—If I had the means of going amongst the lower classes of this country, which I have not and never had and probably never will have, and if I could ascertain that they are as afraid of penal servitude for life as they are of death when a violent temptation comes upon them to commit violence, and I thought that penal servitude for life would operate upon them to the same extent as the punishment of death, I should be very glad to do away with the punishment of death altogether; it is a shocking thing to take human beings as you take cattle to a slaughter house.

307. (*Mr. Ewart.*) Do you not think that there is greater certainty in the case of penal servitude for life than in the case of the punishment of death?—I think that there is equal certainty in both; my experience is not that there is any unwillingness to convict for murder, I do not know what it may be with others.

308. Are you aware that there are as many as eighteen different states and countries which have successfully abolished Capital Punishment, and that the accounts which are given in those countries do not seem to create any apprehension of lynch law?—Of what countries are you speaking?

309. I speak of several cantons of Switzerland and of the United States of America. I can give you a list?—I should expect that anything which answered well in America would answer well here. I think that the temper of the American people must be pretty nearly the same as that of the English, and that that which is found beneficial and effectual there would likewise be found beneficial and effectual here; with respect to Switzerland, I am satisfied that you could not at all compare the Swiss with the English, English people are a great deal more self-willed.

310. (*Mr. Hardy.*) Are you aware that in some of the cantons of Switzerland the popular voice has compelled them to go back again to Capital Punishment?—I was not aware of it.

311. (*Mr. Waddington.*) All the great states in Switzerland have not followed the example of the small states?—I cannot speak upon that point.

312. (*Mr. Ewart.*) Capital Punishment has been abolished in Zurich. In Tuscany it has been abolished since the year 1786, of course with intervals. Such is the result of the inquiry which has been made?—As I have already said, I have not the knowledge or the information to enable me to give an opinion upon that matter. I really believe that an English jury (taking an ordinary English jury—I do not mean to say that exceptions are not to be found) will attend to what you tell them, and apply their minds to what you tell them is the question, and they will give an honest verdict upon it. I do not think that because

a verdict of guilty will be followed by Capital Punishment, it influences them much. I think that it influences them so as to make them exceedingly careful to see that everything is proved which the Judge tells them ought to be proved.

313. (*Mr. Neate.*) Setting aside the feeling of the jury, should you not say that a greater amount of evidence is practically required to convict a man of murder than to convict a man of any other offence, taking into consideration the greater care with which the case is argued on both sides?—Certainly; but I assure you that I believe very great pains are taken that no man is convicted in any case against whom there is not proper evidence. I believe that very great pains are taken by the Judges that a conviction shall not take place except the evidence is perfectly satisfactory. As I have mentioned to you, I have been 14 years a Judge; I have gone very much the Northern circuit—probably more than any Judge now upon the Bench, and by far the greater quantity of crime takes place there, and, so far as I know, only two cases have occurred in those fourteen years in which there was a mistake.

314. Not speaking of murder, but of any other case?—In any case. There was a case of an alleged rape in Hampshire. A woman swore that a man had committed a rape upon her; he was a travelling pedlar. She gave her evidence in a satisfactory way, and swore to the rape upon her, and proved that she rushed out of the house where it was committed, and ran away and alarmed the whole neighbourhood. The man was convicted; it turned out afterwards that there had been a squabble between the woman and the man whether the reward was to be a sovereign or half a sovereign, and that the whole of the outcry arose from her indignation at only getting half a sovereign; she turned out to be one of the worst women in Hampshire. Whether the other was a wrong conviction or not I cannot state, but I was so impressed with the doubt of the case that I persuaded the Secretary of State and Mr. Waddington to bring the man home from Bermuda; it was the case of the robbery at Mr. Bradley's; the man was sworn to in the most positive manner to have been one of the people. A fact that went very much against him was, that it was alleged that on the following day he passed a five pound Doncaster note to a woman at a beer house, and it was proved beyond all doubt that it was one of the notes stolen. I believe if the counsel had let the woman tell her story in her own way she would have said that she had doubts about the man, or that it was another man. It was known in the country that she had been swearing too strongly, and the place got too hot for her, and she went to Australia, but before going she said that it was another man who gave her the note. This was mentioned to me, and, at the suggestion of Mr. Waddington, the police authorities of the West Riding and at Sheffield were set to work to ascertain what the truth was; the police authorities of the West Riding stated that this woman had been under a mistake. The Sheffield police authorities reported the contrary. In that state of things, the Home Secretary thought that the punishment should not be persevered with. These are the only two cases of mistake which I have known in an experience of 14 years upon the bench. I believe that great care is taken by all the Judges that a conviction shall not take place except the prisoner is really guilty.

315. (*Mr. Attorney-General for Ireland.*) What is your opinion with reference to an appeal, or a new trial in Crown cases?—That matter was submitted to us all, and I believe we were unanimously of opinion that Sir Fitzroy Kelly's Bill would be mischievous.

316. But there may be a different Bill for the same purpose?—Yes.

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317. (*Mr. Attorney-General for Ireland.*) Your opinion is that there should not be new trials in criminal cases?—Yes; they are evils (although necessary ones) in civil cases, and, so far as I know, the Act which constituted the Criminal Appeal Court is very fairly carried out.

318. That is so far as the law is concerned?—Yes.

319. But you must have a question of law?—Yes; but you have an appeal to the Home Secretary, and I think that it is as favourable an appeal for the prisoner as can well exist.

320. (*Chairman.*) And that is an appeal which you must have in every case, it must be the ultimate appeal?—Certainly.

321. If there were a dozen trials you must come to that at last?—Yes, and as far as I know that power is fairly exercised, and most certainly with the desire to give the prisoner the benefit of any fair doubt which may arise either upon the trial or after the trial.

322–3. (*Mr. Ewart.*) Then the only change which you would suggest would be in cases of constructive murder and infanticide?—Yes.

His Lordship withdrew.

Adjourned to to-morrow at 12 o'clock.

Wednesday, 30th November 1864.

PRESENT:

THE DUKE OF RICHMOND.
DR. LUSHINGTON.
MR. ATTORNEY-GENERAL FOR IRELAND, M.P.
HORATIO WADDINGTON, ESQ.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

Lord Wensleydale.
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The Right Hon. LORD WENSLEYDALE examined.

324. (*Chairman.*) Your Lordship has had considerable experience in the administration of criminal law in this country?—I have.

325. You were for many years a Judge?—Since the year 1828.

326. And previously to that I believe that you had a considerable knowledge of the subject?—Not so much previously, because I did not practise much at the criminal bar, but I have had very great experience ever since the year 1828 down to the time when I left the bench, which was at the end of 1855.

327. During that time, of course, the subject of Capital Punishment came frequently under your notice?—Frequently.

328. And no doubt you have given it great consideration?—Certainly; I have been examined once or twice upon the subject before Committees or Commissions which have, I believe, reported.

329. Will you have the goodness to state to this Commission the views which you entertain upon the question of Capital Punishment, whether it should be retained or whether it should be abolished?—I am clearly of opinion that it ought to be retained. I formed that opinion long ago, and have never changed it.

330. You do not think that any punishment could be substituted for it?—I think that there are punishments which are capable of producing a much greater effect, but they are punishments which the public would not for a moment endure, such as mutilation, cutting off all a man's members, depriving him of his eye sight, depriving him of his power of hearing, cutting off his limbs, confining him in a small place without the light of day, and so on; punishments of that kind would deter much more than the taking away of life, but I am sure that the public would not endure them.

331. I see that in 1847 your Lordship wrote an answer which is very much to the same effect of what you have now stated, you will probably tell us whether you have at all altered your views from that?—I have not. I have looked at it recently.

332. You were asked, "Do you think any punishment by transportation or by imprisonment would be a sufficient substitute for death "in the cases still left capital"? Your answer was, "I think it "would be a dangerous experiment to substitute punishment by transportation or imprisonment for death. I will not say in all the cases "still left capital, but in some. Imprisonment for life, abroad or at "home, would be a punishment of great severity if rigidly carried "into effect, but it never would be. The criminal condemned to "perpetual loss of liberty would in the course of time become an "object of pity, and the public sympathy being excited the sentence "would be ultimately remitted, and perpetual imprisonment would "practically become temporary imprisonment, and have only the same "preventive effect, whatever it may be, against crime which that "affords. Punishments more severe than perpetual imprisonment, "and short of the loss of life, such as torture or mutilation, the terror "of which might perhaps operate as greatly in the prevention of crime "as the fear of death, could never be substituted, for they would never "be tolerated." Your opinion is unchanged since you wrote that answer?—Entirely; and I wrote a much more full opinion, which I cannot find, in answer to some Commission, and expressed myself at very great length upon that same subject. However, the substance of it is that no punishment, which can be carried into effect practically, can be a proper substitution for the punishment of death.

333. Have you at all considered the crime which is commonly called infanticide, and the law affecting it?—Not particularly that case. I have had a great number of cases of infanticide, but I think that I never had a conviction, and that the woman always escaped.

334. In your view is that a satisfactory state of things?—It is not a satisfactory state of things with respect to infanticide.

335. Would you suggest any alteration in the law?—I have never considered what would be a proper substitution for it, but it ought to be more severe than it is at present; it would be very difficult to draw out that law in an accurate mode.

336. Are you of opinion that some punishment would be desirable short of making it a capital offence, but bringing it to be more severely punished, than it is now as concealment of birth?—I think that it would; it certainly should be more severe than it is now. I have never much considered to what extent you ought to go. I have never known of any case of conviction for infanticide. I never myself had one woman convicted, they always escaped; it was found that the child was not born alive.

337. Have you ever in your experience known juries deterred from finding persons guilty of murder by the fear of the consequence, namely, the fear that they would be executed?—I cannot say that I

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have. I think that if they have been properly instructed upon the subject, they have generally found right verdicts.

338. Imprisonment being substituted for Capital Punishment, would not in your opinion lead juries to convict oftener than they do at present?—I think that it would not.

339. Have you any opinion upon the subject, which you would like to give to the Commission?—I have nothing to add, except what I have already expressed upon two or three occasions which has been reported, and I do not think it necessary to alter anything which I have there said. I believe that it is all published and in print.

340. Have you ever considered the question of public or private executions?—Yes; I have considered the Report of the Committee of the House of Lords upon that subject, and I am strongly inclined to be of the opinion that the executions ought to be private.

341. That is the Report of the Committee of 1856?—Yes; I have read that over carefully, and I am very much inclined to agree with it. There ought to be a great solemnity about the matter, and I am not quite sure that the prisoner ought not to be publicly exposed before his execution, but that he should not be actually executed in the presence of the people. I have, however, some doubt about that, whether it might not attract curiosity, and induce people to come in multitudes, and whether there might not be a very undesirable assemblage of people for that purpose; beyond that, I am strongly inclined to think that the actual execution ought to be private, that it should be done with great solemnity, the church bells tolling, and that there should be some exhibition of mourning on the outside of the place where the prisoner is executed, and that it should be done in the presence of certain sworn persons who should testify in a formal manner that they have seen the sentence of death carried into effect, and the document should be publicly exposed in conspicuous places; in my opinion there should be something of that sort.

342. In the Australian colonies a coroner's jury is sworn?—Yes; and that is also the case at Boston, in North America; the execution takes place very solemnly, and persons are sworn, and state publicly that it has been done in their presence.

343. (*Dr. Lushington.*) Does your Lordship think that the knowledge of a private execution would be tantamount to the effect of a public execution?—Yes; I think that it would if there were certain acts accompanying it, such as the tolling of the bells and the exhibition of mourning, or something of that description, at the place where the sentence is carried into effect, and if there were a regular publication of it in an authorized form in a number of public places.

344. Do you believe that there have been many instances in which the jury, alarmed at the consequences of Capital Punishment, have given a verdict which you highly disapprove of?—I have not myself had experience of that fact. I think that they generally do their duty upon most matters submitted to them of a criminal character. I should say that that is the general result of my experience, that they do much more frequently right than wrong in capital cases.

345. I presume that very few cases have fallen within your knowledge in which it has been afterwards discovered that the verdict has been ill-founded?—I am not aware of any capital case in which I thought the verdict ill-founded.

346. You do not recollect a capital case which took place at Warwick in the year 1820, in which there was a verdict of guilty, and it afterwards turned out that the man was not guilty; it is reported in "Willis upon Circumstantial Evidence"?—I am not aware of that case; my

memory does not serve me with any case of a conviction which I thought was wrong; there may be cases, no doubt, but I am sure that they are very rare. I observe that the great majority of the Judges of England, Scotland, and Ireland, are of opinion that you cannot dispense with the punishment of death; there are very few exceptions. Mr. Justice Coltman, whom I respected as much as any person, and who was a man of admirable judgment and of good sound sense, gave it as his opinion that you might substitute imprisonment, with one provision which never would be carried into effect, namely, that there should be no change whatever, unless it turned out that the man was innocent, that it should be perpetual and fixed.

347. Is it your Lordship's opinion that if Capital Punishment was abolished in the case of murder there would be an increase of crime?—I think that there would. I think that it is the punishment which conveys the greatest fear, and makes the greatest impression upon the public.

348. Do you think that the fear of Capital Punishment operates in the greater number of cases in which murder is committed?—It may very often be that it is committed in a thoughtless moment; but I am quite sure that, if you abolished Capital Punishment, murder would be much more common.

349. Has that been your experience with respect to other offences for which Capital Punishment has been remitted?—I cannot say that I have ever examined that question very minutely. I believe that there are cases in which Capital Punishment has been withdrawn, and the number of offences has afterwards increased. I think that that turned out to be the case when the change of punishment took place in the time of Sir James Graham. When he was Secretary of State he had some returns made, and I recollect looking at those returns, and it appeared that there was a considerable increase. In the case of rape I know it was said by the Scotch Judges that there was an increase.

350. For instance, in the case of forgery, do you not know that the alteration of the law which took place a great many years ago produced in the City a sensation of great acquiescence in the removal of the punishment of death?—I have no knowledge upon the subject.

351. You do not know whether the crime of forgery became more serious or not, or whether the number of cases was increased or diminished?—I suspect that it was increased, but I really have no means of knowledge upon that subject.

352. (*Mr. Waddington.*) There are a vast number of cases of forgery, I believe, which are not prosecuted?—Yes.

353. The returns, therefore, would not give very accurate information upon that subject?—No.

354. Does your Lordship approve of the changes which were made in 1861 when Capital Punishment was abolished for a great number of offences?—Yes; but I have some doubt about some of them.

355. Such an offence as administering poison with intent to murder?—Yes, I have great doubt about that, whether poisoning with intent to murder should not still be punishable with death. If the person escapes the consequences of the poison after it is administered, I think that it is a case in which the punishment of death ought not to be remitted. There is a deliberate intention to poison, and great bodily injury is sustained. I recollect a case which occurred before Lord Campbell upon the Home Circuit, in Essex; there was a woman who frequently administered poison and had never been found out. It was at last discovered that she had administered poison, but the person

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who received it did not die. That woman was executed, and I thought quite rightly executed.

356. Are there not many cases of murder which are still capital, which are less heinous in themselves and less injurious to society than such an offence as that of administering poison with intent to murder?—I think that there are many cases which amount to the crime of murder where there is not a deliberate intention to take life, which are not by any means of the aggravated degree of administering poison where accidentally the person happens to survive; but it is given for the purpose of destroying life. If an alteration were made, I should think that that class of cases ought to be put in the category of capital offences—cases punishable by death.

357. You rather think that the lighter cases of murder might cease to be capital?—I think so. I think that distinctions might be made, and that cases which now fall under the range of murder might be exempt from Capital Punishment, and made punishable with transportation for life or imprisonment for life, as the case might be.

358. There is a certain class of cases which are constructive murders, or murders under great provocation, but not amounting to manslaughter, which you think might be put into a class by themselves?—Yes, I think so. It must be carefully done. Such a clause must be well worded; and I must say that I think that a really serious attempt to murder, particularly by poisoning, ought to be capital.

359. You would include in a separate class, which would be punishable by imprisonment for life, a murder committed in the commission of a felony, where the intention to kill was not perfectly proved?—Yes; although there was an intention to commit crime, yet if the intention was not to take life, it might form a class in which the punishment of death might not be imposed.

360. Do you think that it would be possible by any statutory definition to make the law as to acquittals upon the ground of insanity more clear than it is now?—I do not know that it could be made more clear. Generally a very lenient view of the subject is taken by the jury; but I think that if they were properly instructed and properly taken care of, that would not occur so often as it does.

361. (*Dr. Lushington.*) That is to say, if it was the verdict of the Judge, instead of the verdict of the jury?—If it was the verdict of the Judge, or if the jury were properly instructed as to what insanity meant.

362. (*Mr. Waddington.*) You do not think that the sort of insanity which exempts a person from Capital Punishment in a case of murder could be more accurately defined to the jury than it is in the resolutions of the Judges in M'Naghten's case?—I do not think it can. I entirely concurred in that judgment, and took a share in the preparation of it with my late excellent friend Chief Justice Tindal, who took very great pains, I know, to lay the law down most correctly. I have always acted upon it, and think it quite right. Whether it could be improved in any respect I am not prepared to say, till the objection should be made and discussed.

363. (*Mr. Neate.*) Your Lordship referred to the opinions of Judges generaly as being in the great majority of cases favourable to the continuance of Capital Punishment?—Yes.

364. May I ask your Lordship whether you consider that the Judges have a greater opportunity of forming a correct opinion upon the question whether Capital Punishment should be kept up or not than other educated men of equal intelligence who have applied their minds to the subject?—I am not prepared to say that. They are forced from

their situation to consider the thing a good deal, which other men are not, though they may be intelligent ; but if intelligent men apply their intelligence, I do not know that their opinion is not worth as much, or it may be more than that of Judges.

365. Does not it often happen that Judges restrict their duty merely to looking at the law in these cases of Capital Punishment, without considering at all the expediency of maintaining that law ?—Yes ; it does not form part of their function to judge of the expediency of the law ; they have to administer the law as it is already, and to act upon it precisely as the law directs, whether they object to it or not.

366. Your Lordship may remember that both Lord Denman, who had more experience as a criminal lawyer than almost any man, and Mr. Justice Maule, when examined in 1847, said that they had never directed their attention to the suggestion, whether Capital Punishment should be maintained or not ?—I am not aware that they said so, but it is extremely probable.

367. (*Mr. Hunt.*) I understood your Lordship to say that you thought it might be possible to classify offences which are now deemed murder into two classes, one where there was intention to take away life, and the other where there was not ?—Yes.

368. I presume that your Lordship does not wish it to be left to the jury to say under which class each crime comes ?—Certainly not.

369. Then how would you propose that the alteration should be made ?—I should propose a new Statute stating under what circumstances the punishment was to be capital, and under what circumstances it was to be transportation for life or imprisonment for life, or any other punishment which might be defined by the law.

370. I understand that the test which you would use would be whether there was the intention in the mind of the criminal to take away life ?—That is at present the view which I have, and I should consider that as the main test.

371. Then it would come to this, that a person would be charged on two indictments, or two counts in the same indictment, according to the way in which the Act was framed ; one charging him with the killing and with the intention to kill, and the other charging him with the killing without the intention ?—It might be so.

372. Eventually it would be for the jury to say of which offence the man was guilty, provided that he was indicted for both ?—Yes ; but then the Judge must take care that their attention was directed to that which he himself thought the offence really would be, and they must not be allowed to acquit the man under the feeling that they might acquit him under the one count or the other, but the Judge must see that a proper verdict was found.

373. But eventually it would rest with the jury to find of which offence the man was guilty, in the same way as now in the case of an assault with the intention to do grievous bodily harm and to disable, and so forth ?—Yes ; they must be told that if in their consciences the facts were proved, it was their bounden duty to find him guilty.

374. I understand your Lordship to say that, supposing life was taken in the commission of a felony, without the intention of the criminal to take away life, it ought not to be a hanging offence ?—I am inclined to think that it ought not.

375. I want to put the case to you of life being taken in the commission of a robbery, say a highway robbery or a burglary. When the robber comes probably his intention is to disable and to render insensible, in order to be able to complete his offence of theft, with no direct intention of taking away life, but death ensues, what should you

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say that that offence ought to be?—I think that a line might be drawn, but I am not prepared to say where the line should be drawn. I am of opinion that where there is an intention to take away life, and life is seriously injured though not taken away, the offence should still be capital; but what particular provisions should be made for all other cases which fall under the description of murder being done with malice prepense, I am not prepared to say. I am not prepared to draw the line at present. I think that it might be drawn, but it should be done with very great care.

376. I conceive that it very often happens that violence is committed, the object being to rob, the criminal being indifferent whether death ensues or not?—Yes.

377. Should you include such a case as that in the higher class or in the lower?—I have not thought exactly upon the division. I am not quite sure whether it should fall in the first class or in the second.

378. There would be a great difficulty in making any distinction?—There would be a considerable difficulty about it, but I think that it might be done.

379. (*Mr. Waddington.*) If the violence were very great, there would be no difficulty in inferring the intention to kill?—Certainly. If there is an intention to take away life, I think that it ought to be capital, and you would infer it from the extreme violence.

380. It would not require any express intention by words and so forth, but you would infer it from the act as it is now?—Yes; it would require considerable care to draw up a new Act of Parliament upon that subject, but I think that it might be done with very great care.

381. (*Mr. Hunt.*) Is it the result of your Lordship's experience as a Judge that where a jury have the option of finding a man guilty of two or three different grades of offence, they always find the lower one?—No, I do not say that they always do so, but there is a natural inclination to do it, no doubt.

382. In the case of indictments for assaults with the intent to do grievous bodily harm, and with the intent to disable, with the option of finding a verdict merely of unlawfully wounding, is it not your Lordship's experience that the jury almost always find a verdict of unlawfully wounding?—I think that they generally do so, but I cannot tax my memory with many cases of that kind.

383. Your Lordship said that you were of opinion that executions might take place in private?—Yes.

384. Should you think that the plan adopted in Australia of afterwards having a coroner's jury summoned would be suitable to this country?—I have not considered the details of that matter, but there ought to be a regular set of persons in whose presence the sentence should be carried into effect; they should be sworn, and they should sign some document reporting that they had seen the sentence carried into effect.

385. There must be some means by which the public should be satisfied that the sentence had been really carried into effect?—Yes; and that sentence, with the names of the persons who witnessed the execution, should be published in conspicuous places in the town where the execution took place. I think that it would be very likely to produce a considerable deterring effect, and probably more than the mere fact of the execution being seen by a crowd of people. I should have as much solemnity employed about it as it is possible to attain.

386. (*Mr. Hardy.*) In the case of wounding with intent to do grievous bodily harm, or with intent to disable, and so on, according

to the Statute, has there not been considerable difficulty in laying down the law to the jury, so as to show them clearly what is the meaning of those words in the Statute?—There is some difficulty about the wounding and doing grievous bodily harm.

387. I am speaking of the intent. Is it not difficult to make the jury understand what is the intent in point of law?—I think that there may be occasional difficulties, but not very serious ones.

388. Where the words in the Statute are express, has it not generally been laid down that there must be the intention in the offender to commit the act?—Yes; that the jury must be satisfied that there was the intention to do it.

389. If there was a deliberate intention to take life, must not the Judge instruct the jury that that intention to take life absolutely existed?—If it is confined to taking life, there must be the deliberate intention to take it; you may judge of that from the extreme degree of violence which is used.

390. In fact, I dare say that your Lordship will agree with Mr. Baron Martin that in the result a great number of verdicts for unlawful wounding have taken place under the new Statute since it came into force, although you would yourself say, that there was an intent to do grievous bodily harm?—I do not know. I have not observed what Mr. Baron Martin's opinion is.

391. In fact, under the terms of that Statute, the jury always find the lighter offence?—They generally will do so, if a fair case is made, but, if the Judge takes proper care, I think that the jury will do their duty.

392. With respect to the deliberate intention of taking life, in the case of a rape upon an infirm person who was killed by it, would your Lordship bring such a case as that under Capital Punishment?—Probably not, I think.

393. (*Mr. Ewart.*) Supposing a private execution to take place, would your Lordship think it proper that the press should be present?—I should have no objection to that, so as to communicate the actual last moments of the culprit to the public: it would give greater publicity to the fact that the death had taken place.

394. Has your Lordship had an opportunity of studying the effect of the abolition of Capital Punishment in foreign countries?—I have read all the returns which are given of the countries in which Capital Punishment has been abolished, and of those in which it has been continued. I am not aware of any accounts which have shaken my opinion in the least upon it.

395. (*Mr. Attorney-General for Ireland.*) Has your Lordship considered whether in any criminal case a new trial shall be allowed under any circumstances?—I have considered that question a good deal, and my opinion is given in some of these papers. I do not see how you can possibly do it. I think that the law as it stands at present is quite right upon that subject.

396. Your Lordship does not think that an appeal, upon the merits, to any tribunal can be allowed?—No; I think not. I think that the mischief would be very great; you must enable every pauper to appeal. The effect of appealing would be given to the rich and not to the poor, and the expense and the delay of it would be enormous.

397. Does your Lordship conceive that any assistance in that way could be afforded to the decision of the Home Office, or in Ireland to the decision of the Lord Lieutenant in cases of appeal for mercy?—I do not know how far it could be done by way of assistance to the Home Office, but I think that they would always consult the proper

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persons. There are very seldom any questions of real doubt in administering the criminal law; all the questions of doubt are those connected with property and contracts. I think that you could not make any change in the way of appeal without enabling everybody to do so, and if you enabled everybody to do so, you must give him the money to do it, because the poor would be placed in a very inferior condition to the rich.

398. Supposing that an appeal or new trial were thought of, do you think that it could be granted at the instance of the prisoner and not granted at the instance of the Crown, or should there be reciprocity if it were done at all?—If it were done at all it ought to be done in both ways. The questions which are to be tried in the criminal law are generally very simple, much more so than in the civil law. I do not know that any advantageous change could be made.

399. (*Mr. Waddington.*) Has your Lordship ever tried a case of murder in which there was a conviction where a new trial could properly have been granted, supposing the law allowed it?—No; I think that the jury always require such very clear proof that there never would be any wrong verdict in it; mistakes may possibly be made, but I am not aware of any in the course of my experience.

400. (*Dr. Lushington.*) Not a mistake of identity?—No.

401. Do you not remember the case which Lord Cowper Steward mentions?—No; there have been no such cases that I have tried, and I have had a good deal of experience in the matter, having been something like 30 years at work upon it.

402. (*Chairman.*) I suppose that your Lordship is of opinion that, whatever number of appeals and new trials took place, there must always be the last resort, namely, an appeal to the mercy of the Sovereign?—Yes.

403. (*Mr. Waddington.*) And therefore the Home Office trial must always come, however many trials may intervene?—Yes; I do not think that any change is necessary in that respect in administering the criminal law.

404. (*Chairman.*) Is there anything further which your Lordship would like to state?—No; I think that I have stated pretty much to the same effect two or three times before.

405. We may take it generally, I suppose, that you adhere to the opinions which you have expressed before former Commissions?—From what I have read of my own opinion, I do not desire to alter it. I do not think that I have ever before expressed any opinion upon the publicity of Capital Punishment. I have never been called upon to express it. Upon the best consideration which I can give to the matter, I acquiesce in the opinion of the Peers who were upon the Committee of 1856.

His Lordship withdrew

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The Right Hon. Spencer Horatio Walpole, M.P., examined.

406. (*Chairman.*) You have been Secretary of State for the Home Department?—I was twice Secretary of State for the Home Department; once in the year 1852, from the end of February to the middle of the month of December, and a second time in the year 1858, from the end of February in that year till the month of March in the following year.

407. In that capacity you no doubt have had the subject of Capital Punishment brought before you in various ways?—No doubt. There

were two spring and summer assizes, and there were also two winter assizes, in which I had to consider cases where Capital Punishment was brought under my notice.

408. I should like to obtain from you first of all the opinion which you may have formed on the subject of Capital Punishment, and also what the practice generally in the Home Office is upon that matter. First of all will you state whether you consider that it would be safe to substitute any other punishment for Capital Punishment and if so what punishment? — Upon the general question of Capital Punishment, and the class of offences to which it should be confined, I had to consider it very much indeed in the year 1858–59, preparatory to the introduction of the consolidating Bills upon the criminal law. I consulted at that time the law officers of the Crown in Ireland, and the law officers of the Crown in England, and I conferred of course with the Lord Chancellor. As the result of those deliberations I brought distinctly before the Cabinet two questions which I thought of more importance than any others with reference to alterations which we then proposed in the law, the one with reference to conspiracy to commit murder, and the other with reference to the question whether Capital Punishment should be continued in the case of any offences besides those of treason and murder. Upon the first of those points we assimilated the law of Ireland to the law of England, making the law of the two countries the same. The second of those questions was so important, that I thought it right to bring it distinctly before Lord Derby's Cabinet, and it was fully discussed there. My own opinion was that Capital Punishment ought to be confined to treason and to murder only. The Cabinet, after full discussion, concurred in that opinion ; and accordingly that was the proposition which we made to Parliament. I have seen no reason to change that opinion since.

409. With regard to certain crimes which are now subject to Capital Punishment, but in which there is more frequently a verdict brought in of concealment of birth, (I mean the class which is called infanticide,) have you ever turned your attention to that subject with the view of amending the law, or are you satisfied with the law as it now exists ?— With regard to what is usually understood by infanticide, I think that there is nothing so objectionable in the criminal law of any country, as that the practice under the law should not run in perfect harmony with the law itself. I believe that the practice under the law as a general rule is never to execute in the usual cases of strict infanticide, by which I mean the killing of a child very soon after birth. If then, for the reasons I have given, the practice under the law and the law itself ought to be made uniform, it only remains to consider whether the punishment should be capital in those cases of infanticide, or whether it should not. For the purpose therefore of bringing your law and your practice under it to the same point, and thinking that infanticide is, in I may say 999 cases out of 1,000, a totally different thing from that which is understood as a deliberate murder, I would have the law make a distinct offence of those cases of infanticide, and that offence should be no longer punishable as murder is.

410. Have you formed any idea of what should be considered infanticide, and who would be the parties liable to be brought under it ? —I think that the whole difficulty of the case is there. I believe that the public opinion of the country (and in all cases the criminal law ought to go along with the public opinion of the country) does not look upon the usual cases of infanticide as constituting the same crime as murder for two reasons. First of all, the public do not consider that a child just born can be regarded in the same light as a person who,

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we will say, has grown up (to take an extreme case) and is deprived of all those rights and enjoyments which then belonged to him: and secondly, looking at what is the foundation of all your law with reference to murder, namely, the presupposing malice and malignity, you cannot say that that is the case at least in the public estimation with regard to most of the instances in which a woman kills her child. That being so I think that I would say that infanticide ordinarily, where the crime is committed soon after the birth, should no longer be deemed murder. The difficulty of drawing an arbitrary line as to what shall be the time during which you shall call the crime infanticide only, and beyond which you shall bring it up into the category of murder, is the whole difficulty of the case. My own impression is that I would take three months after the birth.

411. Would you confine it to the mother, or supposing that a nurse was bribed to destroy a child for any purpose, under the age of three months, would you consider that she was entitled to the same exemption as the mother?—I should look upon that as a totally different crime, and therefore when your Grace asks me the simple question whether I would confine it to the mother, certainly all my observations and reasonings tend to that point, and to that point only.

412. (*Mr. Hardy.*) Would you make any difference in the secondary crime which you would constitute between the case of a child severed from the mother, and the case of one still attached by the umbilical cord?—I would not. That is one of the reasons which convince me that such an alteration of the law as I am now speaking of would not be objectionable. I cannot for the life of me understand upon what ground you can say that it is murder to kill a child who has merely had its lungs inflated, and that it is not murder to kill that child after it has quickened in the womb but before it is born. I cannot understand the distinction.

413. The question which makes a great distinction is whether or not it is after the period of parturition?—As regards the character of the offence, I do not see that that distinction is very great. As regards the fact of a separate existence after actual birth, the distinction is of course considerable.

414. And that is the reason why I wish to ask a question with respect to it. You say three months after birth?—I take that as an arbitrary line because I cannot find a better.

415. Do you think that there is anything in the condition of the mother after, say the first 24 hours, to take away the character of deliberation which would make it almost impossible to distinguish the act from the murder of any child?—I think that there is for a week most unquestionably. In most of those cases of the murder of a child it is really done to escape the shame and disgrace, and if the mothers can do it within a week they do do it. I am not justifying the thing, I think that it is a very wicked act, but I believe it is done from that motive and not from malice.

416. But it is almost impossible to suppose that the shame and disgrace are not known, if the child has lived even for a day or two?—There are many cases in the books where a birth has been concealed for a week or a fortnight, or even more, and then the child has been exposed and killed.

417. (*Mr. Attorney-General for Ireland.*) Am I to understand you to apply your observations to infanticide by the mother only?—By the mother only.

418. Not by any other person?—Not by any other person.

419. (*Mr. Hardy.*) You have spoken of not executing for infanticide? Yes.

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420. Has it not come to your knowledge that the convictions are almost none for infanticide?—That is so, but the convictions in former times for infanticide were numerous. The fact of the convictions not being numerous now only confirms what I say, namely, that the public opinion would go along with an alteration of the law, which separated infanticide from the classification of the crime of murder.

421. (*Mr. Hunt.*) You have said that you cannot draw any distinction between the killing of a child in the womb, and the killing of a child after the lungs have been inflated?—That is to say, immediately afterwards.

422. Is not the difference this, that the breath entering the child makes the child a living soul?—Certainly; but it does not make it a rational being, and that is your definition of murder. I speak in the presence of Mr. Waddington, and others, who, of course, will correct me if I am wrong; but I have always understood the real definition of murder to be the unlawful taking away of the life of a rational being from malice express or implied.

423. I am not speaking of the law, but in the nature of things, the breath is what constitutes a human being a living soul?—There is no doubt about it, if you mean by that a living soul with a separate existence.

424. And that is the reason why you should fix a heavier punishment for the destruction of a child after it has breathed, than for the destruction of a child in the womb?—I quite admit that that is a distinction, but in those cases to which I have referred I do not think it applicable to the punishment of the offence.

425. I understand you to consider that public opinion would go with making infanticide by the mother a less offence than murder. I want to see whether you can draw a distinction (I dare say one can be drawn, but I cannot myself draw a distinction) between infanticide by the mother and infanticide by the father, the father wishing to conceal his shame. Take the case of a married man having become the father of an illegitimate child, and doing away with the child immediately upon its birth, how would you distinguish between that case, where wishing to conceal his shame is no doubt the motive, and the case of the mother?—My answer to that question is that I do not believe that those cases ever occur, and I think that it would be legislating for a case which does not occur.

426. I once heard a trial before Mr. Justice Wightman, where a child of three months old, if I remember rightly, which is the age which you fix, was destroyed, and the evidence was that the man and the woman went together to a piece of water with the child, that they came away without the child, that the mother was found with the clothes of the child in a bundle taking them home, and that the body of the child was found in the pool of water. They were both convicted. The woman made a confession that the man committed the murder, but that she was a consenting party. Mr. Justice Wightman in conversation with me, said, "I believe the woman's story, and I shall "recommend her to be reprieved," and he did so. The man was executed, and on the scaffold he made a confession, in which he stated that the woman committed the murder, but that he was a consenting party. According to the law as you would make it, the father would be guilty of murder in that case, and the woman would not; I do not myself see a distinction between the two cases, and I should like to know whether you can make a distinction. I want to know the

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distinction between the guilt of the man and the guilt of the woman?—The case which you have given is one of the most deliberate crimes of which you can conceive; it is the case of a man and a woman conspiring together to take away the life of a child three months old; it is a guilty conspiracy added to the guilt of any one person being malicious enough to take away the life of that child. In that case you have spoken of the woman being reprieved, and the man being executed, that seems to me to lead to the inference that the man was the instigator of that crime, though he tried to throw it upon the woman afterwards, and not the woman, and it is just one of the cases where I should make it murder to take away life, with regard to a person who was not the mother of the child; and in the case you have mentioned, it would also be murder with regard to the mother herself.

427. In the confession one said that he was a consenting party, and that the other did it, and *vice versâ*. Supposing they both said that they were both equally guilty, upon what ground would you make the man guilty of murder, and the woman not guilty, it being a case of the murder of a child three months old?—If the child was three months old, I should execute.

428. I understand you to say that if a mother kills her child under three months old, she ought not to be considered guilty of murder, but of a less offence than murder; but that if the father does it he ought to be considered guilty of murder. I put the case with the circumstances which I have mentioned. Supposing the child to have been under three months old, how would you draw a distinction between the guilt of the father and the guilt of the mother?—I can only say that I still believe that the case never does happen where the father takes away the life of the child merely from the kind of motive which operates on the woman.

429. Supposing that a child is killed within a few hours of its birth, not for the sake of hiding shame, but because it would be heir to property?—Do you mean killed by the mother?

430. No, by anybody else?—Then he would be executed for murder.

431. Then you would confine it simply to the case of the mother?—Certainly.

432. (*Mr. Waddington.*) Do you mean to confine this change in the law to the case of illegitimate children?—My reasoning entirely applies to the case of illegitimate children, because it is to conceal the shame and disgrace, and I therefore should be very glad that all my answers should be read in that sense.

433. (*Mr. Hunt.*) Supposing that the killing was of a legitimate child, you would still wish it to be deemed murder?—I think so. I would leave the law as it is in that case.

434. (*Dr. Lushington.*) With regard to the distinction between the man committing the offence and the woman, do you not believe that the natural motives to commit that offence, namely, destroying the child, are infinitely stronger upon the mother, more powerful and less capable of being resisted, than those which would appertain to the man?—I am perfectly confident that it is so.

435. Do you not think that it is a different degree of moral feeling?—I think so.

436. (*Mr. Neate.*) Would you not also say that a reason for distinguishing between the guilt of the mother and the guilt of the father, is that the woman in those cases has a sense of the child being her property, and thinks that nobody has a right to interfere between her and the child, which the father cannot have to the same extent?—I do

not think that that would weigh in my mind at all. I think that some people might have that feeling, but I do not think that I should rest the distinction upon that ground. *The Right Hon. S. H. Walpole, M.P.*

437. (*Mr. Hardy.*) With respect to your supposition that the father would never take part in these cases, a case was tried some years ago where a father and daughter were indicted together for infanticide, and it turned out afterwards that there was not sufficient evidence of the infanticide, and the question then turned upon the concealment of birth; but as she had disclosed it to her father, I think that it was supposed to be enough to take it out of that category also; but there the supposition was that the child was the father's child. In that case his motive is a different one from deliberate murder, and so is the woman's. Would you there make any distinction?—I think that I should make it murder in that case as regarded the man. I would always leave somewhere the prerogative of mercy to be exercised, as applicable to every one of these cases. I take that for granted. 30 Nov. 1864.

438. (*Mr. Ewart.*) Do not you think that a jury would be apt to let off a person who had killed a child just passing the verge of the limitation of three months which you have fixed, and that they would hardly discover the distinction between three months and three months and a day?—I am quite aware that there always would be that difficulty whatever line you drew; the law must be an arbitrary one, and I only fixed upon three months as being the best period which I could frame to my own mind.

439. Have you ever considered the proposition which has been made, which does not seem to me to be very reasonable, that women should be exempt from Capital Punishment?—I should be very sorry to see that law.

440. It has been done in some countries, but the result has been that they have abolished Capital Punishment as a sort of sequence to that law?—I think that many murders are committed by women quite as heinous as those committed by men, and I believe that the only reason why there is anything like a dread of inflicting Capital Punishment upon women where you would inflict it upon men, is the publicity of it. I think that if you took away the publicity that reason would no longer apply.

441. Do you think that any new definition is required in cases of insanity in consequence of the conflict which exists between the opinions of medical men, and the existing definition of the law?—Not having been much concerned in the criminal courts, I would rather defer an answer to that question to those who are more conversant with the subject than I am.

442. Would you agree with what I understand to be Lord Wensleydale's opinion, namely, that cases of intended but unaccomplished murder, should be capitally punished?—I certainly would not make them capital. I listened with very great attention to Lord Wensleydale's evidence and agreed with almost every portion of it excepting that, but with reference to that, it is exactly the point upon which I ventured as Secretary of State to recommend to Lord Derby's Government that in the consolidating Bill Capital Punishment should be confined to murder and treason. The reason was this, (and it seems to me to be a general reason which applies to all the other cases,) namely, that you ought to have your law in such a state that the inducement to commit the greater crime of murder is reduced to its minimum. You never can tell how far a man's hand is stopped from giving the fatal blow which ends in death, by the belief that if he does forbear from giving that fatal blow his life will not be forfeited. It seems to me, therefore, to be a wise line

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to draw, as a general rule, that if a man believes that the consequence of his crime, however great it may be, will not subject him to Capital Punishment, there is a strong inducement still at work to prevent him from committing the capital offence.

443. (*Mr. Waddington.*) That hardly applies, does it, in a case where the jury find an intent to commit murder?—But then the intent is very difficult to find.

444. In the case of poisoning with intent to murder there is very little difficulty, if the poison has been administered under circumstances from which the jury can reasonably infer that the poisoner wanted to get rid of the person poisoned?—I think that the evidence is more likely to miscarry upon the question whether that was really the intent than it would be upon the fact whether a murder was committed, where the intent is inferred from the facts as proved.

445. (*Mr. Hunt.*) In the case of poisoning there might be the case of a man intending to commit murder by slow poisoning, and after giving one or two or three doses, not enough to destroy life, changing his intention. If the punishment was the same whether he went on or not, he might go on and completely destroy the life?—That is one illustration of what I mean.

446. That would be a reason for not affixing Capital Punishment to the offence of administering poison with the intention of taking away life?—Yes.

447. (*Mr. Waddington.*) Did you ever know such a case?—I never did.

448. (*Mr. Hardy.*) In a clear case, as for instance the substitution of one draught for another, and the person discovering it after taking a part of it, refusing to take the rest, where the taking of it would have produced instant death, there would be no doubt of the intention?—I do not say that there may not be cases of that kind, but you are making a general law, and if you can induce persons by your general law not to commit an offence that is a strong reason for limiting its operation to the graver crime. And you must bear in mind in making general laws that the difficulty of proving the intent must always be greater than the difficulty of proving the fact.

449. (*Mr. Ewart.*) Do you not think that there are certain crimes where death does not ensue which are almost as bad as crimes where death does ensue?—I have no doubt of it.

450. I will put the case of a man who intends to kill another, and who leaves him for dead, but that the man recovers, is it not difficult to draw a distinction between that case and the case of accomplished murder?—I have not the slightest doubt about it; but I think that your general law ought to be, that if the murder has not taken place, then upon the general grounds which I have given, even though the crime may be as great as the crime of actual murder, it is better for society that you should not draw too fine distinctions.

451. Is not the offence of violation in extreme cases almost as bad as murder?—I think that the crime of rape is as bad against a woman as the crime of murder against a man, because it deprives her of the whole of her status in life; but the law has determined that for rape you shall not take away life. It is the last thing for which I would have given up Capital Punishment short of the crimes of murder and treason, but it is given up, and, upon the whole, I think it is better not to re-introduce that law again, though there are cases of rape as revolting as murder.

452. Do not you think that that may be a reason for going further, and that, since you have abolished Capital Punishment for such heinous

crimes as you admit are almost as bad as murder, you may abolish Capital Punishment for murder also?—No, wilful murder entirely rests upon a different footing from every other crime.

453. (*Mr. Attorney-General for Ireland.*) With reference to the subject of infanticide, and as to the period you have fixed, supposing that the period was not three months, or a lengthened period, and that we were to say a week or three days, would there not then be a much larger distinction between the case of the mother and the case of any other human being, than in the case which you have put, of three months. Would not the physical condition of the mother and the moral influences upon her, then distinguish very clearly between her position and the position of every other human being?—I speak very hesitatingly with regard to the three months. I gave that as what, upon the whole, I thought the best period; the line must always be an arbitrary one. If I did not take that period I should take 14 days. The line lies somewhere between 14 days as a minimum and three months as a maximum.

454. (*Mr. Waddington.*) There is a class of cases to which I think you have not referred, namely, where the child being two or three years old, and the woman, being abandoned by her seducer, and in extreme distress, and in a state of great mental agony, and deserted by everybody, she murders the child, would you leave that case to Capital Punishment?—Certainly.

455. Are you aware that it has not been the practice lately to carry out the sentence of the law in those cases?—I am quite aware of that, but, though the law and the practice may not go together, I think that they are much rarer cases than the others; and, leaving the prerogative of mercy where I hope it will be left, I do not see any real inconvenience in continuing those cases as capital. There may be one or two cases in which it would be advisable, even contrary to the usual practice, to execute.

456. Though you are strongly of opinion that the practice of the law should not, as a matter merely of course, differ from the law itself, you would still leave those cases capital?—Yes; they are, I should hope exceptional cases.

457. Lord Wensleydale, in answer to some questions which I put to him, expressed himself favourable to the division of murder into two classes, the one consisting of the most aggravated cases, namely, murder committed with deliberate malice and premeditation, with malice aforethought, in point of fact, and the other consisting of constructive murders, where the malice is inferred from the act, and under circumstances of provocation without any intention to kill. Do you agree with his Lordship in that respect?—It strikes me that the reason which is applicable to cases of constructive murder is no longer so applicable to the present state of your law, as it was before the Consolidation Acts were passed. The reason why you executed for what is called constructive murder was, that a man, having committed some act, or intended to commit some act, which was a felony, and in the commission of that crime took away the life of another person without actually intending it, that I apprehend would have been deemed constructive murder. But I take it that the punishment turned upon this question, namely, whether the crime which he was going to commit would not, in the old state of the law, equally have subjected him to the punishment of death. Since, however, in all the cases of manslaughter (to take the strongest instance of crimes not capital), the punishment of death is no longer inflicted, it seems to me that when a man, in committing a manslaughter, takes away the life of another

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person, without actually intending it, that is no reason why you should execute the culprit as if he were a murderer. In all those cases, therefore, where the felonious act is no longer followed by a Capital Punishment, though the life of another person may be taken away without there being an actual intention of taking away that life, I think the punishment should follow the character of the crime intended.

458. Do you mean cases now punishable by death, or cases formerly punishable by death?—I may say that I think that actual murder should be the only case where Capital Punishment ought to be inflicted, and even there I would except infanticide.

459. (*Mr. Hunt.*) Would you exclude treason?—Oh! no, I did not think that we were dealing with the question of treason. Treason is generally aggravated murder, for it breaks up society, and leads to the loss of many lives.

460. (*Mr. Waddington.*) Where a murder was unintentionally committed in committing a minor offence, you would not make it capital?—I would not. That would be my rule.

461. (*Dr. Lushington.*) In fact, the substance of your view is, that there must be the intent to commit murder?—Yes, that is my view.

462 (*Mr. Waddington.*) What would you say as to cases where there is an intention to commit murder, but where there is extreme provocation, not by blows, or amounting to a provocation, which would reduce the crime to manslaughter, but still a violent provocation, such as, for instance, an injury done to the person's mother or children?—I should leave those cases as manslaughter. I think that the punishment which is now given for manslaughter would be quite sufficient to meet those offences.

463. You would therefore put them into the second class?—Yes.

464. (*Mr. Neate.*) Am I to understand you to say that you would admit a past injury as a sufficient provocation. Suppose, for instance, that a man had calumniated the memory of another man's mother upon most important points, and that that man made up his mind deliberately to kill him the first time he met him?—I think that that is murder.

465. No doubt it is murder now, but would you leave it murder?—Clearly, to be followed by a Capital Punishment.

466. Then what were the provocations which you were speaking of? What sort of injury to a man's mother or children were you referring to, which might reduce the offence to manslaughter?—I think that there might be many provocations of that description.

467. (*Mr. Waddington.*) I suppose you meant provocations offered in a man's presence?—Yes.

468. (*Mr. Neate.*) You would treat striking a man's mother the same as striking a man himself?—Yes, or striking a child, or striking a woman.

469. (*Mr. Hardy.*) Take such a case as happened at Sheffield,—a man is working at his trade, and the man is told that his wife has just been struck by a man in the street, and he rushes out with his knife with which he has been working, and follows the man and kills him, what do you say to that case?—I doubt whether that is murder; at least I would leave such a case to be decided by the jury according to the ruling of the Judge.

470. With respect to intention, take a case of robbery with violence, suppose that a man is armed with a stick, and attacks another person and threatens to rob him, and finding that he does not give up his money at once, knocks him down with the stick and kills him, not intending to kill him in the sense of any deliberate intention of that sort in his mind, but wishing to stun him and to take possession of his

property?—That is the kind of case where I think that, for the general protection of society, you had better have it punishable with penal servitude for life as manslaughter than punishable as murder, the reason being that though in that particular case the life was taken away, yet if you made the act punishable capitally there would be no inducement to a man to inflict the lesser injury or commit the lesser crime. There would be a stronger inducement to a man not to take away life in that case if you did not punish capitally for it than if you did.

471. I will put another case. Suppose that a man shoots at the legs of another, intending to maim him, and saying, "Now I am going to "prevent your getting about as you have done," and kills him?—That is more like the cases of doing bodily harm to a person. I would leave them where they are.

472. Would you make that case capital?—No, certainly not, if there was not the intention to take away life clearly proved. That is to say, if there was not the malice followed by taking away life clearly proved, as a fair inference from the facts, then I certainly would not punish capitally.

473. Do you not think that that would have a tendency to make a man more reckless in the use of his deadly weapons, instead of checking him in the use of them?—I think not.

474. (*Mr. Hunt.*) The case which Mr. Hardy put just now was a case which happened, I think, this year or last year. A man struck another a blow which killed him, and he robbed him, and he was executed. His own account was that he struck him with the intention of stunning him?—But I should not believe that. I should judge by the evidence.

475. The man was found dead. In that case, if the law was altered in accordance with your views, the man would not be guilty of murder supposing that the jury believed the man's statement that he struck the deceased with the intention to stun him, but did not strike him with the intention to take away his life?—Supposing that the jury believed that statement, it is doubtful whether they would bring it in murder.

476. They would now, certainly?—They might.

477. That would be the result if the Judge so directed them?—That is another thing.

478. Supposing that the law was altered in accordance with the views which you have just expressed, the Judge must tell the jury that if they thought that the man struck the blow with the intention to stun and not with the intention to kill, they could not find murder?—That may be so.

479. (*Mr. Hardy.*) In the very case that has just happened of Müller; supposing that Mr. Briggs got out of the carriage himself in attempting to escape from that man and was killed, it would still be murder according to law?—So it would be in any alteration of the law which I would recommend.

480. (*Mr. Neate.*) In the case of Mr. Briggs you would of course infer that there was an intent to kill?—No doubt.

481. (*Dr. Lushington.*) If you take the most decided means to effect death, that implies an intention to kill?—I think so.

482. (*Mr. Waddington.*) If you shot at a man's legs the jury would not infer an intention to kill; but if you shot him in the heart, I suppose that any jury would regard that as showing an intention to kill? Yes, exactly so; I should leave all those cases to the jury.

483. (*Chairman.*) Will you be kind enough to state what is the

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general practice at the Home Office?—The practice at the Home Office may be stated very shortly. Wherever there was a case of a man found guilty of murder, or of any other offence for which Capital Punishment was inflicted, before murder was the only offence for which it was inflicted, the practice was when the matter was brought before the Home Office, to examine the memorial which was sent with reference to that case; to consult the Judge who had tried the case; to have a report from the Judge of the evidence; to lay before the Judge any new facts or any facts which had been brought under the notice of the Secretary of State, and to request from the Judge a report as to his opinion upon that new evidence, or upon the matter. Upon all those materials being brought before the Secretary of State he was then in a position, not in the least degree to re-hear the case, but simply to advise the Crown whether there were any circumstances which would justify the exercise of mercy either in an absolute or in a qualified sense; that is to say, either pardon or a commutation of punishment.

484. That brings me to the point of the possibility or the advisability of establishing what is called a court of appeal, or a new trial. Has that subject occupied your attention at all?—It has very much occupied my attention.

485. First of all I understand you to think strongly that there must be, as is generally admitted, a final appeal to the Sovereign in all cases?—I expressed that opinion very strongly indeed, and I do not see how you can possibly avoid it. I think that there must be that prerogative vested somewhere, that is to say in the Sovereign, and I cannot conceive how it would be so well exercised, so well as by and through the Secretary of State acting, of course, upon his responsibility in making a recommendation. I am very glad that your Grace has mentioned that point, because one of the circumstances which induces me to think that you ought not to have a court of appeal in cases of murder or in any criminal cases as a matter of right, would be this, that when you have had your appeal you will leave the parties still as free as they are now to go on pressing upon the Home Office, that is to say, upon the Crown through the Home Office, to alter the punishment; and all the objections which are urged against the exercise of that prerogative by the Home Office; now (such objections as, that the Home Secretary is rehearing alone, which is not accurate, what has been determined by the Judge and jury), would be ten times aggravated, because he would then be rehearing also what had been determined by the court of appeal and by all the Judges who had decided the case in the Court above. That is one reason why I think that a court of appeal would be most objectionable. The other reason given by Lord Wensleydale I entirely concur in, namely, that it would be really an appeal for the rich and not for the poor. Another reason is that I cannot conceive, if you once admit an appeal on the part of the criminal, how you can refuse to grant an appeal on the part of the prosecutor; it would be the most one-sided justice in the world, and Society, in my opinion, could not be secure if you were to say that an additional chance of escape should be given to the criminal when you did not give to Society an equal power of saying, "You have escaped "improperly, and now we will have you brought to trial again." In addition to all which I heard Lord Wensleydale say, (and he knows much more upon that subject than I do, but I have never heard the contrary from anybody who has argued the matter,) that he did not believe that there were any, or if there were any there were very few cases indeed in which a man had been wrongly convicted upon

questions of fact. The real difficulty in courts of law which justified appeals was in cases with regard to property, and not in cases with regard to crime. Now if you take all those circumstances together and fully consider what is due to society and to the protection of society, as well as what is due to the criminal, I believe that you will find that society cannot be properly protected if you grant this appeal as a matter of right. Further I believe that the criminal is not injured, and that you cannot produce any cases within the last thirty years where the criminal has suffered capitally from the want of such a course.

486. (*Mr. Hunt.*) Do you think that the Secretary of State should be assisted any further than he is at present, by any machinery which could be devised for sifting the cases brought before him?—I should be very willing to consider that point,—if he could be assisted; no method of doing so has occurred to my own mind. My own experience (if I may venture to speak of my own experience) in the matter is that I believe that justice is most perfectly administered there; it may be what you may call a rough justice, because it is not done upon argument, but I believe that it is perfectly administered there, and that it is administered with an eye to mercy as completely as one can trust mercy to any tribunal.

487. That responsibility, of course, is felt very much by every person holding that office?—No man can fill the office of Secretary of State without feeling deeply what the responsibility of it is.

488. The ultimate responsibility must, of course, rest with him, but do you think that he could be at all relieved in his duties by any machinery which might be devised to assist him?—That is only transferring responsibility.

489. I do not mean transferring responsibility, but I mean as to sifting statements. Do you think that he has ample means of sifting them?—He always has the Judge's report which he asks for; he always has every information which is furnished to him by others as well as the evidence produced at the trial; and in addition to that (I would say it more strongly than I do now, but for the presence of one of the Commissioners) he always has a permanent Under Secretary of State by his side, who is perfectly acquainted, and perhaps as well acquainted as any Judge on the bench, with the law of the land. I can answer for myself that in the cases which I had before me, Mr. Waddington invariably went through them separately from myself. Then I invariably went through them separately from him. I never decided one of those cases without writing down, on a slip of paper, all the reasons which induced me to arrive at my conclusions. Having done so I conferred with Mr. Waddington and talked the matter over with him in every single instance where I had such a case as that to decide. Now I do not believe that if a person simply wishes to discharge his duty you can have a better mode of arriving at the truth, not as to whether upon appeal you are to decide the question *de novo*, but as to whether there are any circumstances brought before you to justify you in recommending the Crown to exercise the prerogative of mercy.

490. (*Mr. Neate.*) When you say that it is not the practice of the Secretary of State to rehear a case; does not the Secretary of State go into the evidence?—Every atom of it.

491. Does not he consider the credibility of the witness, and the manner in which his evidence is given?—The Secretary of State assumes that, the trial having been conducted before a competent tribunal, a right conclusion has been arrived at unless it can be pointed out to him that there is something upon which that tribunal has erred.

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But, in the majority of cases, even that point does not arise, because in the majority of cases the question submitted to the Secretary of State is, whether there are not certain circumstances which have not been sufficiently brought before the jury, which palliate the matter, considerably; and which ought to induce the Secretary of State to recommend to the Crown an alteration or mitigation of the sentence. That I believe to be the real state of the case, as far as my experience in the Home Office goes.

492. (*Dr. Lushington.*) It is very seldom that a question of law is brought before him?—I do not think that I ever had a question of law upon a capital case; and you will remember that points of law by Act of Parliament (no doubt in the discretion of the court below) can always be brought before a higher court.

493. (*Mr. Neate.*) Would it be a relief to the Secretary of State, supposing there were two eminent late Judges to act as assessors to him upon these occasions, like the Judicial Committee of the Privy Council?—If you ask me my opinion, of course I should say it would be a satisfaction to the Secretary of State to get confirmatory opinions to guide him; but if you ask me whether I think that the work would be better done, or more fairly or rightly conducted, I do not think so myself. I do not want to stand up for anything which I have done, or to say that I think it could not be better done; far from it. But I have often thought over that matter; and indeed I have reflected on every decision which I have made, and I cannot charge myself at this moment with having given a wrong decision upon any capital case that was brought before me; even in thinking it over again, I do not believe that any one decision which I had to make was not rightly made.

494. (*Mr. Hardy.*) Practically you had at your command, when at the Home Office, any amount of consultation with persons who were qualified to give an opinion if you chose to take it?—Certainly.

495. And it is not necessary to constitute a board for that purpose, because the Home Secretary finds everybody perfectly willing to give him any assistance, if he needs it?—Certainly.

496. You have the Chancellor, and other Judges; in addition to that, I think you will remember that in your own time there was one case in which it became very important to ascertain the facts with regard to the locality?—Certainly.

497. And do you remember that you there authorized an intelligent person upon the spot to have the distances measured, to show whether they were in conformity with the evidence, which was impugned upon that ground?—Certainly, I did.

498. I think that that was not a capital case, but I mention it merely to show the mode in which pains are taken to ascertain any fact, if necessary?—It was a case of rape.

499. I think that the County Court Judge undertook to have it done?—Yes.

500. That was a case where it was not necessary to have a public examination, because it was surveying, the survey being taken under a kind of judicial authority?—Quite so. It was a case of rape, if I recollect, which depended a good deal on the measurement of distance. With reference to appointing assessors, there would always be a danger of turning the Home Office more into a court, which is what I very much object to.

501. In fact, a great deal of matter comes before the Home Office which is not calculated to come before a court at all?—It could not be done.

502. Matter which is very proper for inquiry before the tribunal of

mercy, but which would be very unfit to be brought before a court of justice?—Yes. If the public would only bear in mind that the Home Office is not a court of appeal, but a court of mercy, and that its function is merely to ascertain whether circumstances justify an alteration or mitigation in the punishment, I think that their opinion with reference to the practice of the Home Office would be very materially changed.

503. (*Dr. Lushington.*) But sometimes it operates as a court of appeal, take Smethurst's case?—It may operate as a court of appeal.

504. (*Mr. Waddington.*) In a few cases where the question is one of guilt or innocence it must act as a court of appeal?—Yes.

505. Not judicially, but of necessity it must advise the Crown whether the case is sufficiently clear to justify the sentence being carried out?—Quite so.

506. Not only in capital cases, but in all other cases?—Quite so.

507. (*Mr. Hardy.*) And in effect it must continue to exist whatever intermediate court you may have?—I am confident it must.

508. (*Mr. Neate.*) In your experience is it not very unusual for the Home Secretary to act at variance with the recommendation of the Judge who tried the case?—I do not think that it is usual to do so in one sense, because I really believe from my experience at the Home Office, that there is no necessity to differ from the Judge who tried the case. Now and then there is such a necessity, and then the Secretary of State does take upon himself the responsibility of differing.

509. There is no settled rule at the Home Office that you will not act at variance with the recommendation of the Judge after you have put the case before him?—Certainly not.

510. (*Chairman.*) The judgment of the Secretary of State is entirely unfettered?—Absolutely unfettered.

511. He decides according to his own judgment and conscience?—I think you may take it that everything which is done by the Secretary of State in revising the punishment, is done entirely upon his own responsibility, but with all the aid which he can get.

512. (*Mr. Ewart.*) Do you think that there is any validity in the objection that the Home Office is not a public tribunal?—If it were made a court of appeal I think that that objection would be a very strong one; but if you look upon it not as a court of appeal, but as a place where a responsible minister of the Crown must advise the Crown simply whether mercy is to be exercised or not, or whether the sentence is on that account to be mitigated or not, I do not think that you want publicity at all for that purpose.

513. There is a most grave responsibility?—A grave responsibility, but the moment you admit publicity to it more than you have, see what happens—you instantly have everybody questioning it as if it was a court of appeal. You will deprive the prisoner of an immense advantage if you make it public. You will have this person arguing one way, and that person arguing the other, with imperfect information upon many of the facts; but if you leave it as it is for the Secretary of State upon his responsibility to look into all the case, you may depend upon it that he will never err upon the side of severity; the greater danger is that he errs on the side of leniency, there is no case where he ever errs upon the side of severity.

514. Do you think that any advantage would result from the Home Office giving their reasons publicly for arriving at the conclusion to which they come?—I think that that would immediately make it an appeal to the public, which I do not think advisable.

515. (*Mr. Hardy.*) Practically the Home Secretary is responsible

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in Parliament, he will there give his reasons if he is called upon for his justification ?—Yes.

516. (*Mr. Ewart.*) My question was intended to be, whether it might be made a rule that he should give his reasons ?—I believe that you had better not have them public.

517. (*Mr. Hardy.*) A question was put yesterday by Mr. Waddington to some of the witnesses, upon which I should like to have your opinion, namely, as to whether you would give the Home Secretary any power of ordering the trial of any issue before a court ?—I do not quite follow you.

518. Suppose that the Secretary of State finds upon investigation of the facts which are brought before him, (take a capital case, or any other,) that there is a point at issue, which has not been at issue in the trial, would you give the Secretary of State power to refer it to one of the ordinary courts for decision ?—I have not considered that question fully.

519. (*Mr. Waddington.*) Supposing that facts are advanced in favour of the prisoner, which are contradicted on the part of the prosecution, has it occurred to you whether there may be a power given to direct a new trial to be moved for, or for the Court to direct an issue to try the new facts ?—I should see no objection to that, but generally speaking I myself think that you had better act without that power, upon such information as you can obtain elsewhere.

520. (*Mr. Hardy.*) You have not considered that matter ?—I have not considered that matter fully.

521. (*Mr. Attorney-General for Ireland.*) That question was practically raised in a Scotch case, Jessie Maclachan's case ?—Yes.

522. And the question would be whether a means might be devised for trying a controverted fact, which had not been before the jury ?—Speaking off-hand, and not having considered the question fully, I see no objection to that.

523. But you have not considered any particular mode in which it could be done ?—No.

524. Have you ever known in the Home Office, a decision by the Home Secretary against the opinion of the Judge, who recommended a mitigation of sentence, is there any rule in the Office in that way at all ?—I believe that the Home Office has always followed the recommendation of the Judge, as respects a mitigation of the sentence. In the other view, certainly, I myself in one case acted contrary to the recommendation of the Judge.

525. (*Mr. Waddington.*) Last session Lord Ellenborough introduced a Bill, by which he proposed that the Home Secretary should be assisted by a Committee of Privy Councillors, not less than four. What is your opinion of that proposal ?—I should object to it very much indeed, because I think that you would have great delay, and delay in such a matter is very undesirable.

526. Do you think that the possibility of differences of opinion would very often make a decision almost impossible ?—I think so. I should myself give an undivided responsibility to the person who is Secretary of State for the time being.

527. There would also be great difficulty in getting Privy Councillors together at particular times of the year, in cases of murder ?—Yes.

528. (*Mr. Hunt.*) I understand your view to be that the case is not to be tried over again, but that the verdict of the jury is to be taken as final as to the guilt, and that the Secretary of State is only to consider whether there are any mitigating circumstances which should induce

him to recommend the prisoner to the mercy of the Crown?—Not absolutely, for I believe that the Secretary of State might consider the question of guilt, but I believe that he is hardly ever called upon to do so.

529. And when he is, it is upon new facts which did not come out at the trial?—Almost always upon new facts.

530. (*Dr. Lushington.*) Do you not think that any general rule or custom of informing the public of what passed in the investigation of these cases in the Home Office would be productive of mischief?—Very great.

531. (*Mr. Neate.*) There is a minute kept in the Home Office of the grounds of the decision, is there not?—If you will look at the Judicial Statistics every year, you will see the cases of commuted punishment and the cases where the executions have taken place, and there is a short note which will inform anybody who takes an interest in the subject what were the facts upon which commutation was probably granted.

532. Is not a fuller minute kept at the Home Office?—All the papers are kept.

533. With the opinion of the Secretary of State?—His decision is usually noted on the back of them.

534. (*Mr. Waddington.*) Sometimes upon the papers you will find minutes by myself, followed by minutes by you observing upon the nature of the case?—Yes; I believe it was so in almost every case.

535. In some cases, I think, you have given an account of your reasons in more detail?—In a case, not of Capital Punishment, but in the case of Strahan and Paul's bank, I believe that I wrote, in conjunction with yourself, a very long opinion upon it. I will add one thing which occurs to me at this moment. In the Statute of the 1st of the Queen, which transferred the decision in all these cases of Capital Punishment to the Secretary of State without reporting to the Queen, there is a power reserved for the Judge to report any special circumstances, or to take into consideration any special circumstances in alleviation of the punishment; and I think you will find that it says that in point of law he must enter the judgment of death upon the record, though he does not pronounce sentence. I have been told, what I was not aware of till this morning, that by the Consolidation Act of 1861 the Judge is bound now in all those cases to pass sentence immediately. If that be so it is a very great misfortune. It seems to me that in such a case you ought to grant to the Judge the fullest opportunity at the trial of giving weight then and there on the spot to those special circumstances which have been urged in alleviation of punishment, and which he thinks ought to operate in that direction. But if he is forced to pass sentence when he enters a contrary opinion on the record, that must leave a very false impression on the public mind. It would be much more doubtful whether the Judge in that case should even pass the severer sentence when the milder punishment will probably be inflicted.

536. (*Mr. Hardy.*) Would that affect your view as to classifying murders?—No, not in the least degree; it would merely go in alleviation of punishment. It facilitates my view of not classifying murders, because it does enable the Judge, upon hearing the case, to state whether there are special circumstances which would justify him in not passing sentence of death.

537. Supposing the law of murder to be left precisely the same as it is at present, do you think that your ends would be met by giving a discretion to the Judge upon the circumstances, in such cases as you thought fit, to record sentence of death only?—In the case of infanti-

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cide I am rather strong in my opinion that you had better alter the law, but I think that if what you suggest was carefully provided, it probably would be sufficient to meet the other cases.

538. Do you not think that if the Judge is to have the power, he had better even not record sentence of death if it is not going to be executed at all, but say at once, "I pass a sentence of such an imprisonment," or "penal servitude"?—I think that I intimated that that was the inclination of my opinion. I think that I would entrust the Judge with that power, without going to the Secretary of State at all.

539. As to the modification of punishment?—I think so.

540. (*Mr. Waddington.*) Are you quite sure that you could do that safely, is there not a very great difference of opinion in the views of acting Judges with regard to guilt in criminal matters, so that they now pass varying sentences, and would you not by leaving it to the Judges introduce great confusion?—I will not give an opinion upon that point; it is possible; but at all events I would restore the law to what it was in the first of the Queen.

541. (*Mr. Hunt.*) And virtually you would allow the Judge after verdict to classify the offence, such as murder in the first degree, or murder in the second degree?—No, I would not.

542. You would allow the Judge to exercise his discretion according to the circumstances of the case, as to whether he should pass sentence of death, or record sentence of death, or pass some other sentence. That would be allowing the Judge after verdict in the case of murder, to say, "This is not murder in the first degree," as some of the foreign codes call it, "but it is murder of a lighter complexion," and you would allow the Judge after verdict to discriminate between those two classes of murder?—There might be great objections to that, but at any rate there would be no objection whatever to altering the law which requires him to pass sentence when he thinks that there are circumstances which ought to be brought before the notice of the Secretary of State.

543. (*Mr. Waddington.*) In fact it would be bringing the law to what it was before 1861?—Quite so.

544. (*Mr. Hardy.*) Do you mean deferring sentence altogether, or recording sentence of death?—The difficulties had not occurred so strikingly to my mind as they have done since the question was put to me by Mr. Waddington. Upon the whole it would perhaps be safer simply to go back to the law as it was before 1861, that is, to record sentence of death, but not to pass sentence, and then to have the matter brought before the Secretary of State.

545. Practically, was there ever an instance of execution following the recording of sentence of death?—Very likely not.

546. Then in effect it would be giving the Judge the power to say whether the offence was to be considered as a capital offence or as one of a secondary degree?—It gives the Judge the power of saying at the time, when all the circumstances are before him, whether he is of opinion that the extreme punishment of the law should be inflicted or not.

547. As between the jury and the Judge, for instance, would you give the power to the jury of finding extenuating circumstances? Would that at all meet your approbation in preference?—I am entirely opposed to that. I think that juries would always be tempted to find extenuating circumstances without having, and certainly without giving, sufficient reasons why the verdict should be in that form. If extenuating circumstances (I believe that that is the practice in France) are to be added as part of the verdict, in my humble judgment it should not be done unless full and clear reasons are stated as

the grounds upon which the jury arrived at that conclusion ; and I doubt whether any jury would do it well or satisfactorily. It would be a mere excuse for allowing indulgent juries not to see the law properly administered.

548. Then you would leave a very large discretion to the Judge to act upon certain facts which he thought should influence him in the sentence which he passed ?—Exactly so.

549. (*Mr. Waddington.*) He could not then pass the sentence of death ?—No, he would not pass it, but simply record it.

550. That is to say, in cases in which, if referred to by the Secretary of State, he would express an opinion that the law ought not to take its course ?—Yes ; I would trust that to the Judge. And I would not trust to the jury the power of saying, "We find the prisoner guilty, "but there are extenuating circumstances."

551. That is to avoid the scandal of the Judge pronouncing sentence of death when he intends it not to be carried out ?—Just so. I think that that is very objectionable, and that the law and the practice should be uniform.

552. (*Mr. Hardy.*) If that were done, would it render it necessary to make any definition of murder ?—I believe you will find that murder has not been defined in the Statutes, and I believe you will also find by the Reports of the different Criminal Law Commissioners that they have said that they tried all they could do to see whether they could define murder, and they found that the disadvantages of attempting to define it were so great, that they forbore from making any recommendation upon the point. What I venture to suggest is this. I would leave the law relating to murder as it is, with the single exception of the case to which I have adverted, namely, the case of infanticide.

553. Then in fact, by giving that discretion to the Judge, you think that you would meet all the difficulties of making crimes which are different in their amount to come under the category of murder ?—I think that I would give him the power of representing that fairly and fully to the Secretary of State.

554. (*Chairman.*) Have you turned your attention to the subject of executions being carried out in public or in private, as it is called ?—I have, particularly with reference to what has taken place in the last two or three years.

555. Will you give us the result of your consideration of the subject ?—One of the great objects of a public execution is supposed to be the detering effect of the example which it would have upon others. But the effect of a public execution is exactly the reverse of that ; that is to say, it induces such a scene of demoralization, that more injury is done to the public mind than if the community knew that the prisoner, as soon as sentence was passed upon him, would be executed, with of course proper precautions that the sentence of the law was properly carried into execution.

556. (*Dr. Lushington.*) What difference is there between public executions now and public executions 25 years ago ?—I do not think that there is any, but I think that the argument is always used very strongly (you will find it in all the old books) of the supposed deterring effect of an execution. Of late years especially, (probably it was so in former years to some extent,) the scenes exhibited at the time of a public execution have been so demoralizing that, instead of its having a good effect, it has a tendency rather to brutalize the public mind than to deter the criminal class from committing crime. Therefore, I should wish an execution to be private, and not public.

557. Do you conceive that if the public were not witnesses of the

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execution it would have the same deterring effect?—My own opinion is, that it would have quite as great, if not a greater deterring effect. I think that when the public knew that a verdict of guilty was found against a man for murder, and that the sentence was ordered to be carried out, and that the sentence was carried out, (for that, of course, would be reported to them,) it would have quite as strong an effect upon others, and perhaps a stronger one than when you let the criminal come forward, and, now and then, in a state of bravado, go out of the world.

558. (*Chairman.*) An execution must necessarily be private to the greater portion of the country, must it not, inasmuch as only those who are in the neighbourhood of the place of execution can witness it?—Only those persons can witness it, or people who come from a distance on purpose to see it.

559. But, provided that steps were taken to make it certain that the execution had taken place, and that there could be no doubt upon the subject, the public would be satisfied?—I think that you must have a perfect security for the way in which the sentence of the law is carried out. I am told that in some parts of America they have always a coroner's inquest upon the body after the execution; it is a question whether something of that kind might not be devised. I heard Lord Wensleydale mention (and I should entirely concur with him) that he thought it might be, and that it should be free for those who report for the public journals to witness the execution under certain regulations and restrictions. It would further be desirable that the friends of the deceased should have a right, by themselves or others, to see that the law was properly executed, if they desired it.

560. (*Mr. Waddington.*) It would be necessary to legislate upon this subject, because, at present, the sheriff is responsible for the execution?—You must legislate for it, and it would require very careful legislation. I am not prepared to state all the precautions which would be necessary. I only generally state that I think it might be done, and, if so, I think that it ought to be done.

561. Do you approve of the suggestion which, I think, is carried out in some countries, of having a portion of the jury to attend at the execution?—I do not see that that would be advisable. As far as I have considered the subject, I think that it is a much safer thing to have a coroner's inquest.

562. (*Mr. Neate.*) Do you not think that there is a great difference upon these occasions between an assemblage in London and an assemblage in the country?—I am not competent to judge of that.

563. May I ask you whether you have ever seen an execution?—Never.

564. In coming to the conclusion which you have come to upon the subject of Capital Punishment, namely, that it is desirable to retain it, have you been influenced by any sense of there being a religious obligation upon the State to keep up that punishment?—No; I think that there is none. My own opinion upon that point is, that whatever passages there may be in the Bible upon the subject, they are not mandatory, but permissive, and therefore I do not rest the matter upon that ground; but if I may state shortly the grounds upon which I do rest it, they are these:—First of all, I think that human life ought to be regarded as so sacred a thing that anybody who attempts to take it away from another ought to feel that he does so at the risk of losing his own; secondly, I think that the public opinion of the country (and your criminal law ought to be founded upon the general sense of the community) entirely goes along with Capital Punishment

in the case of murder; thirdly, I believe that if you confine it to murder, it will have a much more deterring effect upon the commission of that which is the greatest of all crimes than any other punishment which you can devise; fourthly, I would venture to add to that, that if you do devise any other punishment, say penal servitude for life, or any mode of punishment which you can devise, in one respect it cannot have so deterring an effect, because it cannot be so certain of execution as Capital Punishment, inasmuch as there will always be an inducement on the part of the friends of the prisoner (and that inducement will be pressed in every possible way) to persuade or influence the Crown through its responsible adviser, to alter the sentence. For all those reasons I believe that the deterring effect of Capital Punishment is much stronger upon the minds of what I will not call the criminal class, but upon the minds of the community in general, than the deterring effect of any system of alternative punishment which you can devise. Believing it, therefore, to be permitted by religion, and thinking that it is quite sanctioned by the best consideration which can be applied to the subject, and that the great object of all punishment is to deter others from the commission of the same crime, I am of opinion that if you confine Capital Punishment to treason and to murder, you have a better system of law than if you did away with the punishment altogether.

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565. You still think that the State is at liberty to consider the question without reference to any religious obligation one way or the other?—I myself think so.

566. (*Mr. Ewart.*) You have alluded to the sacredness of human life; do you think that there is anything in the argument that the State should show its respect by not taking human life?—I think that that was Beccaria's argument when first he wrote that very extraordinary chapter upon the subject, but it seems to me that there is a fallacy in his reasoning there. He grounds his reasoning, if I recollect right, upon the assumption that no society is justified in taking away the life of a human being which God has given to him, because he has not agreed that such should be done. The fallacy of that argument is that you might just as well say that no society is justified in putting a man to perpetual slavery, or in condemning a man to penal servitude for life because the man has not been a consenting party to it. You must take the conventions of society to be the will of the great body of men who are associated together; and supposing that it is not contrary to Divine law that human life should be taken away as a punishment for murder, there is no more reason for saying that society has not a right to inflict death upon me, than there is for saying that society has not a right to shut me up in Siberia for life.

567. Does not Beccaria's argument rather go to show that you ought not to do it except in extreme cases of necessity?—Beccaria goes on to the extreme cases of necessity, and justifies it in treason, upon the ground that that is breaking up society.

568. Nobody, I presume, would suppose that there were not some extreme cases—cases of dangerous civil war,—where the whole foundations of society were shaken, in which Capital Punishment might be necessary?—Quite so.

569. But is it not incumbent that that necessity should exist in order to justify Capital Punishment?—I think that there is a necessity if you leave a person at liberty to take away my life, and he knows that though he does so he will be able to live out the length of his days, even in punishment. You must always remember that if you do away with Capital Punishment you cannot take away a man's life afterwards, however he conducts himself, even in the prison, and therefore you

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make him absolutely reckless as to what he shall do unless you mitigate the punishment, and the moment you mitigate the punishment you make the punishment uncertain.

570. I understand you to say that you would not further remit Capital Punishment till the opinion of society was so changed that it had, as it were, virtually, though not absolutely, abolished Capital Punishment?—I think that if it was the opinion of society generally, that is to say, of the thinking part of the community, that it would be better to do away with Capital Punishment than to continue it, you would be quite justified in altering the law; but my belief is that the opinion of society is entirely the other way, with regard to murder and treason.

571. Then your opinion is not founded upon the abstract policy of maintaining Capital Punishment, but on the fluctuating feeling of society?—I believe that it is not a fluctuating feeling. I believe that it is a universal opinion throughout the world, and not at all a fluctuating opinion. I do not rest it upon what Mr. Neate pointed at in his questions to me, namely, upon the ground that it is commanded by God, but that it is permitted by God, and that it is for the good of society that it ought to be continued.

572. But if the opinion of society changed strongly upon the subject of Capital Punishment for murder, as it has changed in cases of horse stealing, cattle stealing, and so on, which have ceased to be capital, you would then discontinue Capital Punishment?—Certainly I would, supposing it to be the opinion of society, just in the same way as I do not in the least degree disapprove of the people of Florence having done away with Capital Punishment 80 years ago, though I believe that it is introduced again into that country.

573. In certain cases Capital Punishment has been abolished, although up to that time people had been executed for the crime?—Yes.

574. For instance, in the case of rape, and so on?—Yes.

575. In that case the Legislature did not wait for the silent operation of the change of public opinion, but it did not anticipate it, because up to that time, and at that time, rape would have been capitally punished, and such a punishment would have been sanctioned by the opinion of society. Nevertheless, Capital Punishment has been abolished for rape and for crimes of equal magnitude, and yet society has not disapproved of that change?—My own opinion on that point rather is, that public opinion would not have sanctioned the continuance of Capital Punishment for rape, upon the ground that in these cases of rape, there is a very general feeling that the woman was, I will not say a partaker of the guilt, but a very great enticer to it. The two things stand upon different grounds. In one case public opinion would go with you, and in the other not.

576. Then you merely make it a question of change of public opinion?—I think that you have a right to do it if public opinion sanctions it, and if it goes along with what I believe to be the sound policy of the criminal law; and believing, myself, that it is consistent with the sound policy of the criminal law, and in conformity with public opinion, I am strongly for maintaining it.

577. May I ask you a question which touches the religious point. Is it not the fact that the early Christians were strongly opposed to Capital Punishment?—I was not aware of it, but I think it is very possible.

578. (*Mr. Waddington.*) There is an argument which I think has not yet been mentioned, and which I do not know whether you have

considered. It is stated that it is the duty of society to reform its criminals, and it is objected to Capital Punishment that it not only does not reform the criminal, but cuts off from him all possibility of reform. Have you ever considered that question?—It is a very sad thing that a man should be guilty of a crime which hurries him into the presence of his God; but you must guard against a great evil to society.

579. (*Mr. Hunt.*) You do it to prevent other people from being hurried into the presence of their God?—I support it for the deterring reason.

580. (*Mr. Hardy.*) Does it not make a great difference in your view from what cause the opinion of society arises?—No doubt.

581. If it arises from a great demoralization of manners, you would not pay much attention to it in the way of softening punishment?—No.

582. But if it arises from the absence of crime, and from manners being highly civilized and softened, it might have a different effect upon your opinion?—Yes.

583. But it is not the opinion of the country, that is to say, of the multitude?—I do not look upon public opinion as that of the multitude, and I used the phrase, or intended to use it, "the thinking part of the "community."

584. Then I presume that when you find that the punishment of death for rape has been abolished, and that the mind of the country has acceded to it, it has been by the thinking part of the community?—The presumption is irresistible that that was their conclusion.

585. (*Mr. Ewart.*) Does not the conduct of the State in not insisting upon Capital Punishment tend to soften manners, is it not a great exemplar?—I have no doubt that the abolition of Capital Punishment in all the other cases tended to soften manners, because I think that when Capital Punishment was inflicted in cases which sometimes were insignificant, compared with human life, instead of having any tendency to soften manners, it had quite the reverse. But remember you have to-day a different state of things from what existed when Beccaria, and Sir Samuel Romilly, and Sir James Macintosh used their arguments against Capital Punishment. If you look at their reasons, you will find that they apply much more to two classes of cases, either to the class of cases where the punishment was disproportioned to the offence, or to the class of cases where, from the brutality, as I think they call it, occasioned by public executions, a worse state of feeling was engendered than if you did away with Capital Punishment.

586. You think that Capital Punishment stands sacred still upon the question of murder, and you would retain it for that?—With the qualifications which I have mentioned.

587. If that opinion were to change, you would change the law?—I should see no reason if the public opinion was deliberately changed, for continuing the law; but I do not think it will change, and I have given my reason for saying that you had better not change the law.

588. (*Mr. Waddington.*) Have you considered the effect which may be produced by our abolishing Capital Punishment for murder, while all other neighbouring nations retain it. It has been suggested that desperate characters may then come over to this country?—I believe that if you did away with Capital Punishment for murder, and made murder like other offences, you would have murders increase.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Thursday, 1st December 1864.

PRESENT:

DR. LUSHINGTON.
MR. ATTORNEY-GENERAL FOR IRELAND, M.P.
HORATIO WADDINGTON, Esq.
WILLIAM EWART, Esq., M.P.
GATHORNE HARDY, Esq., M.P.,
GEORGE WARD HUNT, Esq., M.P.
CHARLES NEATE, Esq., M.P.

THE RIGHT HON. DR. LUSHINGTON IN THE CHAIR.

The Hon. GEORGE DENMAN, Q.C., M.P., examined.

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589. (*Chairman.*) You have, I believe, paid considerable attention to the question of Capital Punishment?—I have. I may perhaps state that I was called to the bar in the year 1846, and having joined the Home Circuit in the spring of 1847, and taking an interest in the subject, I made a point of attending to and taking notes of every case of trial for murder which took place on that circuit, from that time, namely, the spring of 1847 down to and inclusive of the year 1853, during which time a great many trials took place, and from that period down even to the present time I have done so, wherever I have had an opportunity, and I have also been a good deal engaged both in prosecuting and defending in cases of murder, and during that time of course it was impossible not to think a great deal about the subject.

590. What is the opinion which you have formed generally upon the question of Capital Punishment?—The conclusion which I have come to is, that the chief way in which it operates is as a most powerful weapon in the hands of any counsel defending a prisoner, and that it leads to the acquittal of a great many men, who, if there were any punishment but death as the result of a trial for murder, would most certainly be convicted. That, I think, is the chief effect of it.

591. You think that the infliction of Capital Punishment for murder prevents the certainty of punishment?—I think so, most decidedly.

592. That it indisposes the jury to convict?—Not only the jury, but I think that it more or less influences everybody concerned in the administration of justice, not excepting the Judge. Judges, juries, witnesses, and counsel, I think are all influenced by the existence of Capital Punishment, to give greater chances of escape to prisoners on their trial for murder, who would be tried in a very different way and with much greater certainty of the truth being ascertained, if there were any other punishment. Perhaps I can best illustrate that by mentioning a case or two by which I am most strongly convinced that that is the effect. I have a great many cases here which I have copied out in more or less detail, which were tried during the period that I have mentioned, and at a subsequent period also on the Home Circuit, and in many of which I was myself concerned as counsel on the one side or the other. I will pick out a few cases if the Commissioners desire it, as illustrating the opinion which I have formed. There is one case which perhaps illustrates it better than any other, because that was the case of a prisoner who was tried first for murder then for a minor offence upon the same facts. That was the case of Elizabeth Avis Law; she was tried at Maidstone spring assizes in 1855; she was

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a young person, some 17 or 18 years of age, and rather good looking, which certainly always has a great deal to do with the chances of conviction in cases of Capital Punishment, and perhaps something in other cases, but in cases of Capital Punishment it has a great deal to do with it. She was tried for the murder of her mistress, and the object was plunder, there was no other object which could be suggested. She was charged with stealing a great deal of the property which was found to have been disposed of by her. The murder was committed with an axe, there was no suggestion that it could have been committed by any one else, and if one is to judge at all by the evidence, it was one of the clearest cases that I ever remember to have heard proved. It was rumoured at the time, that there were on the jury persons who objected to Capital Punishment, and the staple of the defence was that the jury ought not to pollute the town of Maidstone by a public execution. She was found "not guilty" and the next day she was tried upon precisely the same facts for stealing the property which she had pawned.

593. (*Mr. Hunt.*) Do you know whether the jury took a long time to deliberate in that case?—I think not extraordinarily long, but I do not quite recollect; as far as I recollect, the time was 20 minutes. Juries generally retire, according to my experience, for decency's sake, for a quarter of an hour or so, in most cases of murder, but I do not think that they were very long about that particular case, perhaps half an hour. The next day she was tried upon precisely the same facts, and was found guilty without the slightest hesitation, of stealing the property which had been the subject of the evidence in the former indictment. That is one case of that kind, most of the other cases have been cases of total acquittal, or of verdicts of manslaughter in very clear cases of murder.

594. Can you give us the sentence pronounced upon the person of the name of Law whose case you have mentioned?—Six months imprisonment, and I can explain it. Mr. Baron Platt was the Judge; the highest punishment which he could give was two years imprisonment, and he explained afterwards that though he thought that she was fully deserving of two years imprisonment, he thought that it was his duty to act upon the verdict of the first jury entirely, and to assume her to be a person perfectly untainted previously, and to treat the case as one of common larceny, in stealing from a mistress, in which case he was always giving six months imprisonment, and he thought that the jury ought to be responsible for the verdict, and not he; but he expressed himself very strongly indeed in my hearing, as to the iniquity of the previous verdict, if I may so speak, and used expressions about the conduct of the jury which I should be sorry to repeat. I have many other cases. I do not know whether the Commission would wish me to go into any of them, but I have a great many other cases in which the verdict has been either total acquittal or a verdict of manslaughter, against what was considered by everybody at the time to be the plainest evidence. I do not think that I can give another case in which it has happened that there was a subsequent trial upon the facts for a minor offence, because they were not always cases in which property was found upon the person.

595. (*Mr. Attorney-General for Ireland.*) Is the statement which you have before you in such a condition as to be used?—I could soon put it into shape; I have done this rather hastily. There are some of these cases upon which the members of the Commission might wish to ask questions as I state the cases, with reference to which I alone could give information, because I have been personally concerned in them, and

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I should like to state some cases which have led me strongly to the conclusion that Capital Punishment acts merely as a strong weapon in the hands of a defending counsel. One is a little afraid that in doing that one may sometimes appear to be egotistical, but of course the reason why one does it in cases in which one has oneself been engaged is because one knows more about them. There was a case of Palin which I will mention.

596. (*Mr. Hunt.*) You say that you believe that in the case of Law it was rumoured that there were some persons on the jury opposed to the punishment of death?—It was.

597. Do you suppose that that was known to the counsel for the defence?—I suspect that it was. I suspect that he had reason to know that there were on the jury panel some Maidstone men of those opinions, because in that particular case a most unusual amount of challenging of the jury took place, in order to get Maidstone men upon the jury, so that ultimately the jury consisted pretty generally of Maidstone people.

598. (*Mr. Neate.*) The challenges which took place were by the prisoner?—Yes, they were peremptory challenges by the prisoner.

599. (*Mr. Ewart.*) Does the Crown ever exercise its right of challenge to exclude persons opposed to Capital Punishment?—If the counsel for the Crown had reason to believe that there was upon the jury panel any man who had formed a strong opinion upon the question of Capital Punishment, he would exercise his right of challenge, letting the man stand by till he was ultimately removed.

600. (*Mr. Hunt.*) You have known it done?—Yes.

601. (*Mr. Ewart.*) Is it done more often than it used to be?—I cannot say that.

602. (*Mr. Waddington.*) I suppose you are aware that in America (I forget whether it is in Massachusetts or in Pennsylvania) the Judge examines the jurors before they are sworn as to whether they have any decided objection to the punishment of death, and that if they say that they have they are not allowed to be sworn?—I think that I have once heard such a question put by a Judge to a juryman upon the Home Circuit, and the juryman answered in the affirmative, that he had certainly formed a strong opinion, and that he should wish to be relieved, and he was relieved.

603. (*Chairman.*) You have mentioned that occasionally you think that a verdict of manslaughter has been given when perhaps the evidence brought the case up to the crime of murder. Have you not known instances in which the Judges have refused to take a verdict of manslaughter, and have made the jury declare whether the prisoner was guilty of murder or not?—Perhaps you will first allow me to give two strong instances of cases in which verdicts of manslaughter have been returned, as I consider plainly against the evidence, in cases where I was well aware of the facts. There was a case of John White, who was tried at the Lewes Spring Assizes in 1859 for the murder of his wife. He was a labouring man, in the service of Messrs. Lee, the great contractors, and he had lived on uncomfortable terms with his wife, and had used threatening expressions towards her. He was seen going away with his wife alone, and she was found battered to death with heavy stones. He was taken into custody, and without going into all the facts of the case, I have referred to my notes again, and have got this expression from the prisoner, which I remember was a portion of the evidence, "How do you know that I murdered her? Did anybody see me do it?" That was one of the facts in evidence against the prisoner. I have referred to the Annual Register for the

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report of this case. The jury found him guilty of manslaughter only, and it is added in the report, which is entirely in accordance with my recollection, "to the evident surprise of every one in court, the prisoner "himself, who had evidently made up his mind for the worst, in- "cluded." That was a case in which I was junior counsel for the prisoner, and it was entirely the opinion of every one who was present that Capital Punishment alone had caused a verdict of manslaughter to be returned.

604. (*Mr. Waddington.*) Who was the Judge who tried that case? —I have not taken the names of the Judges.

605. (*Mr. Hunt.*) Can you give us the sentence in that case?—I have not taken the sentence, but it was a very long period of transportation, and I have since heard of that man from Mr. Lee, who took a very kind interest in the case, that that man is behaving extremely creditably abroad as a labouring man in good employment. There was one other similar case, which was, I think, as strong.

606. With reference to the case of John White, I suppose that his counsel had addressed the jury?—Yes; Mr. Serjeant Parry.

607. Was it put to the jury that there was provocation, so as to reduce it to manslaughter, or did Mr. Serjeant Parry address the jury to bring in a verdict of manslaughter?—No doubt it was suggested, but there was not a particle of evidence of it, and there was no appearance of a struggle or anything except such as would be necessary in the case of a poor woman being battered to death, and attempting to escape; there was no injury upon the man, or anything of the kind.

608. (*Mr. Neate.*) Was that his own defence to his attorney?—As far as I recollect it was not.

609. (*Mr. Hunt.*) There was no witness to the deed in that case? —None whatever, except that they went away together in one direction very shortly before.

610. Quarrelling?—There was no appearance of it, except that they had been in the habit of quarrelling and that he had used very violent expressions to her.

611. (*Mr. Waddington.*) He did not use a deadly weapon, there was no evidence of his procuring a knife or a pistol or anything of that sort beforehand?—No.

612. The stones, I suppose, were found upon the spot?—Yes; the stones which were the cause of death.

613. (*Chairman.*) Have the Judges refused to take a verdict of manslaughter and required a verdict of murder or not?—I cannot give the exact case put, but I think that I can give one which will answer the spirit of the question. I remember a case of two persons of the name of Coe, who were tried before Mr. Justice Coltman in the year 1848 at the Maidstone summer assizes. They had been found guilty of manslaughter only by the coroner's inquisition. Upon reading the depositions Mr. Justice Coltman, finding that the case was a case, as he termed it, of murder or nothing, ordered a bill to be sent up for murder against the two Coes. The facts of the case were that these Coes, being young seafaring men, had left their ship (I think at Ramsgate, it was some place on the coast of Kent) and had come by night into the town and had become rather intoxicated, and they were going about the town making a noise, knocking at doors, and making a great disturbance, contrary to the Local Act which governed the place. A constable, in the execution of his duty, desired them to desist, which one of them would not do; one of them continued to knock at the doors and the constable attempted to take him into custody, whereupon the other came to the rescue of his friend and a great scuffle took place,

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in which so much violence was inflicted upon the policeman that he died of the violence.

614. (*Mr. Neate.*) Had the man a weapon, a bludgeon, or anything of that sort?—I cannot be quite sure, unfortunately I have not taken a note of that point. I will look to it and supply that afterwards. I think not, there may have been some stick or other. The Judge decided that, as the constable was in the execution of his duty, and the one had come to the rescue of the other to prevent the constable from performing that duty, and owing to that violence the constable had come to his death, the case was one of murder and not of manslaughter. He directed a bill for murder to be sent up, and that bill was returned, and the prisoners were tried, he ruled according to his view in summing up the case to the jury, and the jury found a verdict of "not guilty" and those young men were set free.

615. (*Mr. Hunt.*) They were not put upon their trial for manslaughter upon the coroner's inquisition?—No; it is exceedingly unusual when prisoners have once been tried to try them again upon the same facts, but in this case they could not have been tried again, because they might have been found guilty of manslaughter upon the indictment for murder, and therefore they were in jeopardy.

616. (*Mr. Neate.*) You do not quote that as a case where the existence of Capital Punishment prevented a just verdict, do you?—No. I understand the gist of the question to be, Are there not cases in which Judges are bound by their duty to say, Murder or nothing, and have refused to take a verdict of manslaughter? Now, here was such a case.

617. (*Mr. Hunt.*) With regard to the case which you have just cited, the coroner's jury had found manslaughter, is it not your experience that the coroner's jury constantly find murder where the Judge tells the jury who try the prisoner afterwards that it is only manslaughter?—Very seldom indeed, I think.

618. Are not the coroner's jury always inclined to find murder when it is rather doubtful whether it will amount to murder?—I am not aware of any case in which a coroner's jury has found a verdict of murder, where the Judge has told the jury only to bring in a bill for manslaughter. I do not remember any such case, but there may be such cases. I know of many cases in which a coroner's jury has found a verdict of manslaughter, when there was no foundation for manslaughter.

619. But not of murder?—Not of murder, I think. I have not attended so much to the finding of coroners' juries. I think, however, that we generally, as a rule, find that when there is a coroner's inquisition for murder, there follows, as a matter of course, a bill for murder also.

620. In the case which you have mentioned, do you attribute the acquittal of these men to the dislike of the jurors to Capital Punishment itself, or do you think that it was not a *bonâ fide* case of murder?—My belief is, that they refused to act upon the ruling of the Judge (because the facts were as indisputable as possible), and that they felt that it would be shocking to send any man to the scaffold for an offence such as those young men had committed.

621. The offence not being premeditated?—The offence not being according to their notions the offence of murder, though they were told that it was murder in law.

622. (*Mr. Waddington.*) It being what is called a constructive murder?—Yes.

623. Is it not the fact that coroners' juries, in cases of infanticide,

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very frequently find verdicts of wilful murder, in which the juries afterwards either acquit or find guilty of concealment of birth only?—In the answer which I gave just now, the case of infanticide was not at all in my mind; it is so different a case in the mode in which it is dealt with. They frequently do so, no doubt.

I think that the case of Palin is a very strong case of the extent to which Capital Punishment protects a very guilty man. I should not, perhaps, speak so freely (because he was my own client) unless facts had shown subsequently what sort of man he was, and unless he had been now dead; but I should like to give the Commission a history of the criminal altogether, from first to last. His name was Robert Palin; he was tried for murder at the Kent winter assizes in 1855. He had been convicted of a burglary some five years before, and he was then sentenced to 10 years transportation. He only suffered four years and four months of that period (whether by transportation or imprisonment I do not know), and he was released from Dartmoor early in August 1855. He was tried for this murder at the winter assizes in that year, and the evidence was exceedingly strong. A house was left by the male inhabitants at half past five in the morning; at about 20 minutes past six a man, whom three persons mowing in a field at the back of the house swore to be the prisoner, was seen running away across that field. The next morning at seven o'clock the prisoner was met on the road and searched by a constable, who was looking out for another man; the constable had not then been told of anything connected with this murder, he was not looking out for the property which had been missed in the case of this murder; he searched the bundle, and saw certain things in the bundle which were afterwards found upon the prisoner in Gloucestershire, and identified as the property of the murdered persons.

624. (*Mr. Hunt.*) The policeman let him go with the bundle?—Yes, he not being the person that he was in search of. The man carried away the bundle, and it was afterwards found upon him in Gloucestershire, and the things found in that bundle were things which were missed from the house where the murder was committed.

625. Were they sworn to by the policeman as having been seen by him in the bundle?—Yes; he was able to swear at the trial, "Those "are the three or four different articles of clothing which I saw in the "prisoner's bundle the next morning after the murder."

626. (*Mr. Waddington.*) Was that the case of the murder of a girl?—Of an old woman in a cottage at Cudham in Kent. The murder took place on the Saturday morning, and the bundle was seen on the Sunday morning. The prisoner was apprehended in Gloucestershire on the 4th of September, at the house of another ticket-of-leave man, named Mark Wheeler, and he claimed these clothes as his own. He told a quantity of stories about where he had been; there were multitudes of witnesses called to contradict every part of them. The only answer which one could give to that part of the case was, that they had not exhausted everybody who was in every house, so that some part might possibly be true; one had that sort of thing to say. He was acquitted, and I have no hesitation in saying, now that the man is dead, that I know that he was guilty.

627. (*Mr. Hunt.*) What was your defence in that case, was it that he was a participator in the burglary, but not in the murder?—No; that he never was there at all.

628. Upon what hypothesis did the jury acquit him?—That it was a case of circumstantial evidence, and that it was just possible that all the things might be true, and that yet he might not be guilty, and that

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the three mowers might have told a lie. He was seen in the field running away just at the time of the murder.

629. I should have thought that the jury might have acquitted him, thinking that several persons were concerned in the burglary, and that he might have remained outside the house ?—There was no suggestion or appearance of more than one man being concerned; there was not anything to lead to such a conclusion as that, and he was the only man charged or thought of at the time; and he was seen by the three mowers, as they swore at the trial, running away from the house within half an hour of the time when the house was left locked up, and he was the next morning found in possession of the property. It was about as strong a case of circumstantial evidence as I ever heard tried before a jury.

630. (*Mr. Waddington.*) How was the murder perpetrated ?—By a poker or tongs in the house, I forget which.

631. (*Mr. Ewart.*) The articles found upon him had been in the house ?—They had been in the house at the time.

632. (*Mr. Hunt.*) Why do you think that this man was acquitted because the punishment would have been capital ?—My reason for saying that is, that I am as certain as of anything which is not matter of actual eyesight or knowledge, or a matter which one can positively swear to upon oath, that if there had not been Capital Punishment for the crime, that man would have been convicted by any jury that ever sat. If it had been a case of burglary, or if it had been a case of stealing, or any other offence, it is impossible to my mind to conceive that that man would have been acquitted.

633. But you have no reason to suppose that that was the reason from any knowledge ?—No.

634. (*Mr. Waddington.*) Have you not known cases equally strange which were not capital ?—No.

635. Have you not known most unaccountably strange acquittals in cases not capital ?—I have known very strange acquittals, but they have been generally founded upon some rational argument that you have not called somebody who might know something about the matter. Now in this case there was no reason why any single person who could possibly have been called should prove anything in favour of the prisoner.

636. Have you not known acquittals in cases not capital upon the speech of counsel urging that there was no sufficient evidence, when the evidence was amply sufficient ?—I have known many strange cases, no doubt, but I remember none so strange as this, looking at the care and pains with which the case was got up, and the completeness of the testimony. I think that there was always a better excuse for an acquittal than there was in this case.

637. (*Chairman.*) In those cases of acquittal, should you presume that the acquittals take place upon considerations which would fairly appear reasonable to the jury ?—I cannot always say that. I cannot always say that juries have not in minor cases, from some reason of prejudice or otherwise, acquitted a man; but I see nothing in this case which should lead one to suppose that the jury were in favour of the man in any way. The man was known to be a ticket-of-leave man, —that is what at the trial he was known to be,—the worst possible character, and the associate of other very bad characters. I cannot therefore attribute it to any prejudice in his favour.

638. (*Mr. Waddington.*) Have you not yourself as counsel obtained acquittals where you were as perfectly satisfied of your client's guilt as you were of Palin's ?—Yes; but not where the facts had been so

exhausted by inquiry previously, and where there was no conceivable prejudice in favour of the prisoner.

639. (*Mr. Hunt.*) The case which you mention is not an uncommon case, is it, namely, that of a murder, and the prisoner being in possession of the goods stolen at the time of the murder?—That is very common.

640. And is it not very common for the jury to acquit the prisoner if, though connected with the burglary, he has not with his own hands perpetrated the murder?—That I have known.

641. Might not that have been so in this case?—It is quite impossible. There was nothing in the slightest degree to warrant them in taking that view of the case. He was the only man charged; it was evident that the murder had only been committed by one person, and according to the evidence of three persons he had been seen coming away from the house about the time when the felony was committed.

642. (*Mr. Waddington.*) When was the murder committed?—About 6 in the morning; he was in a field at the back of the house, within I think about 90 yards of the house, going in a direction from the house across the field.

643. (*Mr. Attorney-General for Ireland.*) There was no evidence except the possession of the goods?—I have all the notes. There was something to be said about the mowers. They had not sworn quite so positively before the coroner as they did at the trial, and there were observations which may, of course, be made in every case. One is bound to say all one can; but there was nothing which any member of the Bar, in talking it over, at all thought ought to have availed against the certainty of the circumstantial evidence, except that it was a case of circumstantial evidence.

644. (*Mr. Neate.*) The general feeling of the Bar was that it was an improper verdict?—Yes.

645. (*Mr. Waddington.*) Was not there a very strong case in which you were engaged, of a murder near Chichester?—I was not in that case, but I have a note of it; that was a case of a soldier.

646. Was not that a stronger case than that of Palin?—It was an intensely strong case. He was tried for the murder of a young man named Houghton, at Chichester, at the Lewes spring assizes, in 1862. He had deserted from his regiment, and there was considerable evidence of great ill-will against one of the officers. He took his rifle with him, a shot was heard fired in a field, and Houghton, who was supposed to have been mistaken for the officer, was killed. The prisoner's rifle was found close to the spot where the shot had been fired; the prisoner himself was apprehended a long way off, and ran away from the constable when he first saw him, and there were many other circumstances which were very strong indeed.

647. (*Mr. Neate.*) Had he not reason to suppose that his officer would be going that way?—Yes, there was every reason to suppose that he would be going that way at the time.

648. (*Mr. Waddington.*) He had never seen or heard of the young man who was killed?—Just so, and he ran away from the constable when apprehended. I did not remember that case so well, as I was not engaged in it, but I have refreshed my recollection this morning, by looking at the Annual Register for that case. He was found "not "guilty," and, as the Annual Register again says, "to the surprise of "everybody in court, including the prisoner himself."

649. (*Mr. Neate.*) That was a case of stupidity of the jury. I suppose that there would have been no difficulty in that case if he had killed the officer?—I never heard that suggestion. I have no means

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of knowing, but I cannot doubt that under the summing-up of the Judge, Lord Chief Justice Erle, the jury ought to have had, and in all probability would have had, no difficulty in finding the man guilty if the punishment had not been capital.

650. (*Mr. Hunt.*) Can you mention the name of the Judge who tried Palin ?—Mr. Justice Crompton.

651. (*Mr. Neate.*) Have you reason to suppose that the juries on the Home Circuit take a different view from juries in other parts of the Kingdom ?—I myself think that there is a probability of it, from the fact that the Surrey juries (though they are hardly in question, because most of the Surrey cases are tried at the Central Criminal Court) and the Kent juries would be rather likely to be influenced by those feelings, because they consist very much of the class of London tradesmen, and I think that the objection to Capital Punishment is, as far as I have heard, stronger in the case of London tradesmen than it is in an agricultural part of the country.

652. Are they a more highly educated class than the class forming the juries in other parts of the country ?—I should not like to say that, because I have not the same experience of juries in other parts of the country.

653. (*Mr. Waddington.*) Do you think that the juries at the Central Criminal Court are generally indisposed to convict in cases of murder ?—I do not say affirmatively that that is so, but I think that if you compare the juries of tradesmen, of which I think principally the Surrey and Kent juries consist, from the large towns in Kent and Surrey, in the nature of metropolitan towns, with agricultural juries, farmers and so forth, it will probably be found that they are more imbued with the desire to abolish Capital Punishment than countrymen ; and so far as it affects the acquittal of prisoners on trial for murder, I think that it would operate more in those cases than elsewhere.

654. (*Mr. Attorney-General for Ireland.*) Have you known of many cases in the last 10 years of complaints of the juries in London for wrongful acquittals ?—Do you mean Central Criminal Court juries ?

655. Yes ?—I have never myself attended the Central Criminal Court.

656. Have you observed in the newspapers any complaints of those juries in capital cases where they should have convicted ?—I cannot speak particularly as to the juries at the Central Criminal Court, but there was a very strong case of acquittal by a jury at Croydon two or three years ago in the case of a German, of the name of Franz, which many members of the Commission will remember. I will use that case as an illustration of the way in which counsel look at the matter. I defended that man Franz, and I remember being extremely anxious about the case, because one is always very anxious to save a man's life when he is one's client. The case turned mainly upon the jury being satisfied that he was one of two Germans who were in and about Reigate shortly before the murder took place.

657. (*Mr. Waddington.*) Was it a jury *de medietate* or a jury of Englishmen ?—It was a jury of Englishmen, they almost always choose an English jury as far as my experience goes. I had the management of that case, and I certainly should always choose a jury of Englishmen. This man Franz was tried at Croydon in the summer of 1861, and the case mainly depended upon whether the jury believed him to be the man who was with another German in and about Reigate just before the murder took place. There was very strong evidence indeed of his identity, there were five or six witnesses at the least

swearing to his identity, some had sworn more positively at one time than at another, but there were five or six swearing to his identity as a man who was about Reigate, and who bought a twopenny ball of lay-cord. The man who made that ball was called, and swore that the piece of twine found upon a bundle shortly after the murder, which undoubtedly belonged to the prisoner, was a portion of the lay-cord which he had made for Mrs. Cramp of Reigate, for whom alone he made cord of that description, and there was therefore so strong a case of identity of the prisoner as being one of the men who had committed the burglary, that it was a most dangerous case to suggest that he was not there, and, of course, still more dangerous that it should be proved that he was there, in addition to the fact that a book, which was undoubtedly his and in his handwriting, was found in the room of the murdered woman. He was the taller of the two Germans if he was the man, and it was in the hands of the taller of the two Germans that a bludgeon was seen, which, in all probability, was that with which the murder was committed. Being for the defence in that case I had the night to think of it after the evidence was given, and I not only thought very anxiously what was the best line to take in defending that man, but I consulted many of my brother barristers, in whom I had confidence, as to whether it would be safe to put as one solution of the case, that the man, though he might have been one of the two who had been concerned in the burglary, yet might not have been the man by whose hand the murder had been committed. It was a suggestion which one would never have thought of putting if the question had been merely one of burglary or if it had not been to save a man's life. The jury would never have accepted for a moment any such solution in my judgment if they had not had to decide whether they should hang the man or not. I decided, against very much advice, that in a case of life and death one must leave nothing untried, and I put to the jury, as one solution of the case, that he might have been there and yet not have committed the murder. The Judge dealt extremely lightly with that suggestion.

658. Who was the Judge in that case?—Mr. Justice Blackburn. He dealt with the suggestion extremely lightly; but I have reason to believe that the jury jumped at that solution, and acquitted the prisoner on that ground, from what I heard afterwards from one of the jurymen themselves.

659. (*Mr. Neate.*) That would have been murder all the same in law, would it not?—The Judge treated that point as so clear, that he did not, perhaps, enter into argument sufficiently to prevent the possibility of the jury acting upon a notion that the prisoner might not be liable, but they certainly, in acting upon that suggestion, acted in the teeth of the strong ruling of the Judge.

660. (*Mr. Hunt.*) Did the jury acquit in that case?—They did.

661. And you think upon the ground which you put to them?—I have reason to know it, because I was told so by one of the jury afterwards.

662. (*Mr. Neate.*) Was not the evidence as to the twine rather shaken? There were suggestions that it was common, and so forth; but it was not seriously shaken, and the man's own book being found in the room was very strong evidence that he was one of the men. Before leaving Palin's case, it may be desirable, I think, to speak of his subsequent history. I know some facts which possibly are not known to Colonel Henderson. It is an element in the inquiry to see whether the public are in the main protected by this law which exists. Palin having, as I stated, left Dartmoor in the beginning of August, and having been

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apprehended upon this charge of murder, which took place on the 25th of August, as soon as he was acquitted at Maidstone was immediately taken into custody by a Gloucestershire policeman, who came with a warrant into Kent, for a burglary committed in Gloucestershire, between the time of his release from Dartmoor in the beginning of August, and the murder at Cudham on the 25th. He was taken back to Gloucestershire, and he was tried before Mr. Baron Bramwell, at Gloucester, I think at the assizes following those which I have spoken of, he was convicted of the burglary, and sentenced to 15 or 20 years transportation, he went abroad and, as I have heard, was hanged there.

663. (*Mr. Hunt.*) What was the age of Palin?—I think that he was about 25. I do not know whether the Commission have in full the case (it is a very instructive one) of Sarah Chesham, of all her trials, and acquittals, and convictions. I have notes of all her trials, and will give them if the Commission desire. It is a very strong case. She was first tried for murder at the Chelmsford spring assizes in 1847. She was a very respectable looking woman, she was tried for the murder of her son; there was strong evidence of her buying arsenic, the child was perfectly well, two of her children died quite suddenly, and she gave several false accounts about them. She was recommended to apply to the doctor when she first spoke of their being ill, which she did not do; poison enough to cause death was found in two of her children; and there were a great many circumstances which convinced us at the time that she was guilty, and convinced me that she owed her acquittal, which took place, to Capital Punishment.

664. (*Mr. Waddington.*) Who was the Judge upon that occasion?—My father.

665. Did he sum up at all in favour of the prisoner?—I have read his summing up as far as the newspaper gave it (it was very short) but there was nothing at all violent for a conviction or against it, as far as I can see. She was acquitted of that charge, and of another charge, and then there was a third case at the same assizes against her, in which she was acquitted; but on looking over that case I think that it is quite clear that she was properly acquitted. In the other two cases there was an acquittal which I attributed at the time to an unwillingness to hang a woman, and to no other cause.

666. (*Mr. Hunt.*) You have no reason to know that, except that you cannot account for the acquittal in any other way?—I do not know what operated upon the jury, but it was a conviction which one had, and a conviction which certainly my father had, that those were most improper acquittals. I had a firm conviction that that woman was saved on account of Capital Punishment. At the summer assizes of 1848 at Chelmsford, Mary May was tried for poisoning a person of the name of Watts. This Mary May is stated in the report to have been a repulsive looking woman, and she was found guilty, and after her conviction she made a confession in which she charged Sarah Chesham with having taught her to poison. Then in the spring of 1851 Sarah Chesham was tried again for administering arsenic with intent to murder her husband.

667. (*Chairman.*) Was she tried before Lord Cranworth?—Before Lord Campbell. In that case the evidence showed that though there was a considerable quantity of arsenic, the arsenic which was found in him was not sufficient of itself to cause death; Professor Taylor gave that evidence. I remember well before that case came on conversing with the counsel for the prosecution, and I remember his saying that

one reason why they had decided to prosecute for administering arsenic with intent to murder was, that they thought that in all probability the jury might not know that that was a capital offence.

668. (*Mr. Waddington.*) Was Sarah Chesham defended by counsel?—Yes.

669. One can hardly suppose that her counsel would not know that the offence was capital?—I remember the counsel for the prosecution saying that to me. Very possibly she might not have been defended by counsel until the case came actually into court; she was very likely defended by some gentleman who was asked by the Judge to defend her. I do not know how that was, but it was a very strong case of proof of administering arsenic; it was a very strong case of the finding of arsenic, and all the symptoms of death were consistent with poisoning by arsenic; and Professor Taylor said that though the quantity of arsenic which was found would not of itself cause death, it was probably and almost certainly (I think he did say certainly) caused by the administration, if it had been administered some time ago (which the evidence showed), of a very much larger quantity, quite sufficient to cause death; and I remember the reason which I have stated being given, and seriously given, for prosecuting her not for the murder.

670. (*Mr. Hunt.*) In order to delude the jury?—You may call it deluding, but that the jury might not have prominently before them the fact that they were trying a case of Capital Punishment.

671. As I understand you, Professor Taylor said that the poison found in the man was not sufficient to cause death?—Of itself.

672. Supposing that she had been tried for murder, and that fact had come out, it would not have been sufficient to sustain the charge of murder, would it?—Yes, because Professor Taylor's evidence was that though the quantity found in the stomach was not sufficient of itself to cause death, a certain absorption takes place, and taking the time of the arsenic being actually administered, which was the fact to be proved there, and taking the time of the discovery of the arsenic in the stomach and the death of the man, there must have been arsenic enough to have caused death, in order to leave as much as was actually found. That was Professor Taylor's evidence.

673. In order to have found it to be murder, you must have inferred a larger quantity of arsenic than was positively discovered?—Yes.

674. You would not have advised a prosecution upon that evidence, merely having an inference of the kind?—But for the existence of a desire to prevent the fact of Capital Punishment coming strongly before the jury, the evidence was as conclusive of the one offence as of the other; there was no reason to suppose that the death was caused in any other way.

675. (*Mr. Attorney-General for Ireland.*) Was she convicted that time?—She was convicted that time, and hanged.

676. (*Mr. Waddington.*) If I recollect rightly, Professor Taylor distinctly said that he could not undertake to swear positively that the death was caused by the administration of any one dose of poison?—He did.

677. That would have raised a question of law whether a series of administrations would have amounted to the offence?—His view was that it might have been caused by a continual administration of small doses, and it appeared in that case, or afterwards upon Mrs. Chesham's confession (I think that it was upon her confession), that she had got the same arsenic with which she had poisoned her children out of the stump of a hollow tree, and afterwards used it for the poisoning of her husband, after an interval of a year or so, I think.

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678. (*Mr. Hunt.*) Have you any reason to suppose that the jury did not know that this was a capital offence?—I have reason to think that it was deliberately kept back from them, and that it never came out in the course of the trial; that Lord Campbell was very careful about it, and that the counsel for the prosecution was very careful about it, and that that point was not used in her favour.

679. Did not counsel for the defence allude to it?—My impression is that it was kept in the background to such an extent as possibly to make it doubtful to the jury whether she would be hanged or not.

680. (*Mr. Waddington.*) That counsel must have had a very different view from yourself of the effect of Capital Punishment upon the jury?—He may not have thought of it; he may have assumed that the jury knew it. My own recollection decidedly is that it was not made use of in that case.

681. (*Mr. Hunt.*) With reference to the prosecutions of Sarah Chesham and Mary May in 1847 and 1848, why do you suppose that it was the feeling against Capital Punishment which led to Sarah Chesham's acquittal, and that that feeling did not lead to the acquittal of Mary May at the same place, by a jury similarly composed?—Because the case of Mary May was so strong a case.

682. Then the reason is that the evidence against Mary May was much stronger than the evidence against Sarah Chesham?—There are cases which are so strong that a jury dare not in the face of day say, "Not Guilty." I do not mean to say that Mrs. Chesham's first case was so strong a case as that of Mary May; I think possibly it was not, but it was a case in which, according to my conviction, she would certainly have been found guilty if there had not been some reason operating upon the minds of the jury beyond that which ordinarily operates upon their minds in cases where the punishment is not capital.

683. (*Mr. Waddington.*) Do you remember the case of Belany, which was tried at the Central Criminal Court?—It was before I was called to the bar, but my recollection is that it was a dreadfully strong case.

684. It was tried before Mr. Baron Gurney, I think, who was a very strong Judge for convictions?—Yes.

685. (*Chairman.*) Did you ever know a case in which an acquittal has arisen from one or more of the jurymen having been corrupted?—Not to my knowledge. I have several cases here, during the years which I have mentioned from 1847 down to 1853, in which there have been verdicts of guilty, but they did not bear a very large proportion I think to the cases in which there have been acquittals, or verdicts for manslaughter.

686. (*Mr. Attorney-General for Ireland.*) Have you numbered the cases in which you consider that there was a failure of justice for the reasons which you have indicated?—By looking through these papers I can very soon give a notion of them. I will supply the number of cases in which, according to my opinion, there have been either acquittals or verdicts of manslaughter entirely against the evidence, and which I can only account for by the aversion to Capital Punishment.

687. (*Mr. Waddington.*) Is there not a great difference in the mode in which Judges sum up these cases?—Very great, and that I think is one of the great objections to Capital Punishment, that there are many Judges who do not seem to have the fortitude (if that be the proper word) to carry it into execution, so far as their part of the duty is

concerned, and the same with witnesses, the same with juries, and the same with counsel.

688. So that in reality in these cases of murder it makes a very great difference in the result before what Judge the prisoner is tried?—A very great difference indeed. I do not say that that circumstance does not also apply to other cases, but it very strongly applies to these, and I think more strongly than to any of them.

689. It would apply to a certain extent to all cases, but the more serious the case, and the greater the responsibility, the stronger would be the application of the observation?—Certainly, and I should also imagine, though it would be more within your own knowledge than mine, that it must be found to apply *à fortiori* when the Judge is called upon to say whether he is satisfied or not with the verdict for the purpose of deciding whether the prisoner is to be executed or not.

689a. Have you ever heard any case in which persons have been tried for duelling?—There was the Bartelemy duelling case, tried upon the Home Circuit, in which the verdict was manslaughter. I do not say that that verdict was an improper verdict.

690. Did the Judge lay down to the jury in that case that they were bound to find a verdict of murder if they believed the witnesses?—The prisoners were foreigners, and I believe that the view which the Judge took in giving them a light sentence was that they might not be aware that according to the law of England it was murder; that of course would be no defence.

691. Was not that case tried by Mr. Justice Coleridge, who is a member of our Commission?—Yes.

692. (*Mr. Neate.*) There was a suspicion of foul play?—Yes; but it was completely negatived by the evidence, and completely disclaimed ultimately by everybody.

693. Bartelemy had a superior weapon?—That was charged, but the result of the case was that nobody imputed that when the prisoners were sentenced.

694. (*Mr. Waddington.*) Have you observed a similar indisposition to convict in cases where the extreme punishment is penal servitude for life?—I could not quite say that I have compared the two, because what I have done has been diligently to watch trials for murder, and I have not so closely or carefully watched cases in which the punishment is not capital; but having had a very considerable experience myself as a prosecuting and defending counsel in such cases, I should say that the certainty of conviction is very much greater indeed in cases where the punishment is not capital, than where it is, and where convictions ought to follow.

695. With reference to cases not capital is not the certainty of conviction less in a case where the punishment is very severe, than in a case of comparatively very mild punishment, does not the uncertainty of conviction increase according to the severity of punishment?—It may be so. Without going into statistics, of course, it is impossible to have a very clear notion upon the subject, but I should think that it would not be found so. According to my own belief, the more severe the punishment, excluding death, taking the offences as you find them, the more convictions you would find in proportion to the charges, and I should rather think that you would find that in the larcenies, and the small cases about which no great interest is felt, a larger proportion of acquittals take place than in the heavier offences. But one reason for that may be that the larcenies are mostly tried at Quarter Sessions, where there is much greater uncertainty of trial. In charges of greater magnitude there is always much more doubt as to whether the highest

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of all is the one to which the real attention of the jury will be directed. In charges of greater magnitude there is almost always included a less one ; there is a gradation.

696. I am speaking of the actual acquittals. Take the case of rape, for instance, where the punishment is penal servitude for life ?—Rape is a very peculiar case.

697. Take the cases of burglary and larceny ?—The number of cases of burglary for trial is 487 males, and 35 females, making a total of 552.

698. What is the number of acquittals ?—Of those, the total number acquitted is 114. In simple larcenies, 7,889 is the total number put on trial, and the total acquittals are 1,792. The proportion of bills not found in the larcenies is much larger than in the burglaries ; 370 bills were not found out of 7,889 cases, whereas 15 bills were not found in the other instance.

699. (*Mr. Hunt.*) In the case of murder the absence of the prosecutor makes the difficulty of proof much greater than in most other cases, does it not ?—No doubt ; and in the case of a burglary I should say that there is always this consideration, that in order to prove the burglary you have to prove more things, you have to prove the hour of the night, and a quantity of things upon smaller points, upon any one of which the prosecution may fail. I do not know whether this list contains under the acquittals for burglary the cases in which persons are found guilty of minor offences, because in going through these statistics last summer, I found that a good deal of difficulty was created by its not being stated how that is, whether you are to find under the acquittals for burglary the cases in which persons are acquitted for burglary, and afterwards found guilty of something else, or whether you are to find those cases under charges of something else, and convictions of something else.

700. (*Mr. Waddington.*) The burglary cases would be put down by themselves, and if the parties were convicted of larceny they would be separate ?—In the convictions for larceny, and in the numbers for trial for larceny, I think you will find included all those who being tried for burglary are found guilty of larceny.

701. Would not that be a very small number indeed ?—No, I should say that it would be rather a large number; it is not unfrequently the case. It might not be a very large proportion, but it would constitute on the whole possibly a sufficient number to change the relations, because that introduces an element of certainty into the larcenies which does not exist in the other cases.

702. I did not suppose that there was a very great difference, but you seemed to think that there were more convictions in proportion in heavy cases, such as burglary, than in larceny ?—Yes, I should have thought so ; I did not express a strong opinion upon it.

703. (*Mr. Hunt.*) If you look at the crime of arson, you will see an enormous proportion of acquittals there ?—Arson is almost always a case of circumstantial evidence.

704. There is very great difficulty of proof ?—Yes.

705. Do you not think that the difficulty of proof in the case of murder accounts for the number of acquittals, there being generally no eye to see the crime committed ?—Generally, no doubt. I do not of course lay any stress upon any case of murder in which I have not myself personally formed a strong conviction that the acquittal was contrary to common sense and common reason.

706. (*Mr. Waddington.*) Have you ever known a person convicted

of murder whom you thought innocent?—Never; nor of any other offence, I may say, except on one occasion.

707. Never of rape?—Not convicted.

708. (*Mr. Attorney-General for Ireland.*) Assuming all that we have heard with regard to the uncertainty which is produced in this way, do you think that it much diminishes the deterrent effect of this punishment?—That of course is a matter which can but be matter of opinion, and I should think that the better opinions upon a subject of that kind would be of those who have gone more among the criminal classes. I can only say that I have never seen any case in which it has been brought to my mind, by evidence or by observation, that a man who intends to commit or is on the brink of committing murder, appears to have been prevented from committing the murder by the thought of Capital Punishment. That is the only way in which I can answer that question.

709. (*Mr. Hardy.*) Do not you think that you have discovered that, in the case of persons who have avoided committing a murder under certain circumstances, when they saw that the detection would be immediate?—I cannot say that I have observed it in any case. I certainly think that there must be occasional cases in which a person who might otherwise be tempted to commit murder has had his hand stayed by the fear of Capital Punishment. That was the view, I think, which my father took when he was examined before a Commission upon the subject, and it was the only part of it upon which, I believe, he expressed any opinion; but I do not myself recollect (I have thought about it and tried to find it) ever seeing a particle of evidence in any particular case of any person having been practically prevented from committing murder by the thought at the time of Capital Punishment.

710. Would it not be very difficult to obtain such evidence in such a case, and yet you might have the most distinct evidence that a person had been on the point of committing a murder, and that detection being in view he had renounced the intention at the moment, and had committed it under other circumstances afterwards?—Yes; I do not think that barristers are people who would be likely to fall in with such cases, but as far as they would be likely to fall in with them, I have seen no evidence of it. No doubt there must be such cases, but I never saw them.

711. (*Mr. Waddington.*) Have you ever known a case where a person who was doubting about committing a murder, committed it from a feeling that he would be acquitted from the dislike which a jury entertains to Capital Punishment?—I have read of cases, and heard of cases, and have myself heard it proved in evidence, that prisoners, before committing a murder, have used expressions something analogous to this, "I do not care—I will swing for it," and they have committed the murder. That has been part of the evidence in cases occasionally.

712. I am speaking of a case where a man has committed a murder owing to the chance of escape in consequence of the dislike of juries to Capital Punishment; do you know that that has ever happened? I am supposing a case where a man has expected to escape in consequence of the dislike of Capital Punishment which you mention as being entertained by juries?—I can only speculate upon that point, but I should say that in all probability Mary May may have been induced to poison the man whom she poisoned by the knowledge of Sarah Chesham's impunity.

713. It has been suggested that such a man as Palmer might have been emboldened by that chance?—And I cannot say that Palin, after

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having been acquitted of the murder in Kent, may not have been induced to commit a capital offence afterwards upon the chance of acquittal again.

714. But you have not known or heard of any instance in which that was proved?—Not as an affirmative fact.

715. (*Mr. Hunt.*) Do you not think that Palin's victim in Australia had great reason to complain that Palin was not hanged in England?—That he was not kept from injuring her, at all events.

716. (*Mr. Waddington.*) Supposing Capital Punishment to be retained, have you ever considered whether the crime of murder might not be divided into two classes, one of which might remain capital, and the other of which might be punishable with penal servitude for life?—Yes; I have thought a good deal about that matter, and one case, which you may remember, made me think very uncomfortably about it, because I always had a feeling that it was a case in which the recommendation of a jury was rather harshly set aside. It was the case of Murdock; he was tried for breaking out of Hastings Gaol; he was by no means an audacious-looking man, nor a man of any bad character, as far as it appeared; but possibly it was afterwards found out that he was worse than I had any reason to suppose him to be. He was tried at the summer assizes at Lewes, in 1856, for the murder of his gaoler, and the facts were that he was the only man prisoner in the gaol; there was a little boy besides. He was in for some very small offence. The gaoler was a very old man, and, shortly before the death of the gaoler took place, Murdock had had some conversation with a brother prisoner, who had since been discharged from gaol, as to how easy it would be to effect an escape, and he had explained to him how, when the old gaoler came to bring them their breakfast, they might burst out of the door and lay hold of him by the collar, and twist his neck, and hold him down, and so escape. After the departure of this confidant of his, he communicated with the little boy in the adjoining cell, and said that if that boy would be sharp and on the look out he would get him his liberty, and upon the gaoler coming to the gaol the next morning, I think with the breakfast, Murdock rushed out of the door and seized hold of the gaoler by the collar while the boy took a ladder to escape; the boy got over the wall, and the man then pushed the gaoler down rather severely, no doubt, and escaped over the ladder. All the facts tended to show that escape was his sole object, and that he had not a murderous object; but there was violence enough to cause the death of this old man, and he did die. When Murdock was apprehended, the same day, according to the testimony, he showed a very great deal of contrition upon finding that the man was dead, and seemed extremely sorry (there was a great appearance of sincerity about all that), and it ended in the jury recommending him to mercy in these words, as I learn from the report in the Annual Register; they "strongly recommended him to mercy on the ground that they believed that he had "no intention to kill the deceased." The Lord Chief Baron tried the case, and he thought it of great importance that there should be a conviction.

717. And he laid down the law very strongly I believe?—He laid down the law very strongly that the intention was immaterial, and the jury acted upon that, and strongly recommended the prisoner to mercy in the terms which I have stated. I was asked by the court to defend that case, and I thought the recommendation would have saved the man's life at the time, but he was hanged. Comparing that case with others in which mercy had been extended, it appeared to me to be a case in which

either by law or otherwise mercy might be permitted by a distinction between one kind of murder and another.

718. (*Mr. Neate.*) He must I suppose have intended to use sufficient violence to disable the gaoler in order to effect his escape ?—The moment he got the gaoler upon the ground he ran off, and upon seeing the gaoler's daughter, who then appeared and ran after him, he locked the door; and kept them both from him, and according to the evidence he did not believe that he had done anything which would lead to the death of the gaoler; he was a very old man.

719. He did not die of strangulation, but he died of the shock, I suppose ?—The evidence was that he had received a violent twist of the neck; there was no doubt whatever that it was murder in law.

720. How long after the attack did he die ?—In the course of the day. It shows to my mind that there are many cases of exceedingly different degrees of moral guilt, at all events, included under the law of murder.

721. (*Mr. Waddington.*) The case which you have stated is where a man had a purely selfish motive, but what do you say to cases of very violent provocation by words which are not sufficient to reduce the crime to manslaughter, but where a man is extremely provoked, and upon the spur of the moment in a fit of passion kills a person, he having no intention to kill him, but merely having the intention to injure him seriously ?—I think that you desire me to express an opinion as to whether upon the whole it would be desirable to classify cases of murder. I must say that my own opinion upon the subject is that, however desirable, it would be practically impossible without introducing almost as much mischief as it would cure, because I think that it would lead to the violation of their duties by jurors even to a greater extent than takes place at present, which of itself is a great mischief. I think that it would leave the number of persons who should actually be executed so very small, that the deterring effect of Capital Punishment, so far as one can see, would be almost altogether gone, and I think that the difficulty of classification would be something enormous. I think that you would necessarily by any mere definitions, or by leaving it to the jury to define, be including cases of an inferior amount of iniquity and excluding cases of a superior degree of iniquity, and that, therefore, practically it is a thing which can hardly be done.

722. Has not that distinction been made in the French law ever since the Code Napoleon ?—Yes, and as I understand the result is, that in cases of the most audacious and deliberate murder verdicts are constantly brought in of extenuating circumstances, where no one believes that there are extenuating circumstances.

723. Are you not aware that the law of extenuating circumstances was only passed in 1835 ?—No.

724. Between 1810 and 1835 there was no law of extenuating circumstances, but there was a distinction between premeditated murder and murder committed without premeditation upon serious provocation ?—I was not aware of that ; and I must say that, so far as my feelings are concerned, I should be very glad to see a diminution of the capital offences. Though practically I think that it would be very difficult, and might perhaps lead to more evil than it would cure, I should be very glad to see it tried, owing to my belief that we unnecessarily send out of the world every human being whom we execute.

725. There would be some cases in which it would be difficult to draw the line, but would there be any difficulty in distinguishing between such a murder as I describe, committed under great provoca-

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tion, and a murder committed by deliberately poisoning a person for the purpose of getting property on his death?—I think that the difficulty would perhaps not be so much in the enacting part, as in so enacting that the Judge should satisfactorily lay down to the jury, and the jury satisfactorily act in their own minds upon the distinction which you might desire to draw.

726. Do you think that in cases so very different as those the matter would be so very difficult, either for the Judge or for the jury. Take such a case as Palmer's, or Rush's, or that of the Mannings, where you have deliberate assassination?—I do not think that there would be any difficulty in including very bad cases, but I think that by so defining it as to endeavour to include the case of the Mannings, or other cases, you might probably leave out some cases which would be just as bad.

727. (*Mr. Neate.*) What the Legislature would have to consider is, not whether any definition might not leave out some case of exceptional atrocity, but is it not rather a question whether it would leave out any case likely to increase. The object of the law, as I put it to you, is not to provide against cases of exceptional atrocity, but to repress cases of crime which are likely to increase if they are not sufficiently repressed?—My own feeling is that the law of Capital Punishment as it exists does not operate at all, or that it only operates, if at all, inappreciably upon the minds of murderers taken in the mass, and that if you take the various classes of murderers, there is more on the whole done by Capital Punishment to induce murders than there is to prevent them. I am speaking partly of course of the brutalizing effect of putting to death at all, not only by public executions, but by any executions. I also take this into account, that I believe that there are many murders which might be actually traced, if you could go into men's minds, to the morbid effect produced upon men's minds by the interest which is shown by the community in persons who are going to be sent out of the world. Now I cannot myself doubt, though of course it would be impossible to prove it, that from the extent to which the man Müller has been made an object of great interest by the female population of this country, the result will be that before many months are over we shall hear of some other murders; it will produce feelings in the minds of those who know it and who saw it, and who themselves felt that interest, which will tend to produce murders. I fully believe that it will have that effect, therefore I cannot quite go into the question of the effect of Capital Punishment upon the prevention of murders. I think that there are cases where murders are committed, as it were impromptu, by persons who are in the commission of a burglary, and so forth, and where in a moment they may have their hands stayed by the fear of Capital Punishment; but I do not think that that feeling applies to the great majority of murderers, who are persons overcome by overwhelming passions, which they will glut at all hazards.

728. (*Mr. Waddington.*) Then do you approve of the English law with regard to murder as it now is, embracing so many crimes of totally different descriptions?—No, I cannot say that I do.

729. Are you aware of any other civilized country in which the law with regard to murder is the same as that of England?—I should approve of the law of England, or at all events I should not dissent from the law of England, if the law of England did not visit murder with what I conceive to be an unnecessary punishment.

730. Whatever the punishment may be, do you approve of the law of England visiting these crimes of such totally different descriptions with the same punishment?—I do not myself see that there would be

any mischief in it, provided that the law gave a power to administer a punishment which should be to a certain extent proportioned to the offence. That the law should call all those offences by the name of murder I think would be immaterial, provided they were not all punishable by a punishment which I think is thoroughly inapplicable to many of them, but certainly to some.

731. Retaining the law of murder, and making these cases murder, might not you divide them into two classes, always supposing Capital Punishment to be retained? Might not you so alter the law as to divide murder into two classes, so that the cases in which Capital Punishment should be inflicted would be pointed out by the law, instead of being left to the prerogative of the Crown, as the matter is now?—I have no doubt that it might be done; that retaining Capital Punishment you might properly exempt from Capital Punishment certain things which are now murder, and which you might then call murder of another class.

732. Are you aware that that is now the law in the states of New York, of Massachusetts, of Pennsylvania, and of Indiana, and, I believe, of all the principal United States—that they have divided murder into two classes in that way?—I am not aware of that. I stated that when I addressed my attention to this subject last summer I had never gone much into the question of what had taken place in foreign countries.

733. (*Mr. Ewart.*) You ground your opinion on the general objections to Capital Punishment?—Certainly. I have not myself gone into the question with reference to retaining Capital Punishment in any case, because I do not believe that in any case, however atrocious the murder may be, it operates upon the whole for the protection of society.

734. (*Mr. Hardy.*) As I understand you, you think that the interest excited in Müller is calculated to lead other persons to commit murder?—I think so.

735. Then it must be to commit murder with a view to their own conviction?—No, that is not my view. My view is that it is calculated to do it in the sense that it will have that effect, that it so debases and hardens and demoralizes people to be looking upon a man who is guilty of the foulest crime as an object of interest, simply because he is going to suffer an exceptional punishment; that it tends to lower the morality and the law-loving feeling of all the community upon whom that person exercises that sort of influence, by the interest which they take in him; and that there is that effect produced upon those who attend his execution, and upon those who read the reports and the rumours of all that he has said and done in gaol, so far as they are persons of low education, and generally likely to belong to the criminal class.

736. (*Mr. Ewart.*) You mean that it turns away the public from horror of the crime to interest in the criminal?—I think so.

737. (*Chairman.*) Do you mean that it tends to brutalize the public generally?—I think that it does.

738. (*Mr. Ewart.*) And it sets an example of the very crime which it is intended to check?—I think so. I do not quite know that that is the expression which I should use, but I think that the very fact of the interest which is taken causes them to look less seriously at the crime and more leniently upon the offender.

739. (*Mr. Hardy.*) Do you think that the circumstances of the murder would cease to be as interesting to the lower class of the public if there was no execution?—Indeed I do. I think that if Capital Punishment were abolished there would not be half the morbid interest

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in cases of murder which now exists. You do not find that it is so in any case in which Capital Punishment does not exist, and the sympathy, I think, would then be transferred from the murderer to the murdered man, and his family and friends.

740. Upon what do you found your opinion that there is a sympathy with the murderer?—I found it partly upon finding that in tolerably well-educated circles (I use this by way of illustration), taking the weaker part of the community, there was a morbid interest, and a conviction of innocence on the part of the man Müller against the clearest reasoning and evidence, which made him for the time almost an enviable person in the eyes of the rest of the community.

741. (*Mr. Neate.*) Do you not also think that even among those whose opinions are in favour of Capital Punishment there is a want of that sternness which would enable them to carry it out in the only way which would make it truly effectual; that all those who come into contact with the prisoner, whatever may be their abstract opinions, are led to treat him with consideration and kindness, which is inconsistent with a proper feeling of detestation for the crime?—I have already said that I think that many of the Judges in the course of the trial are influenced by that feeling.

742. What I say applies after the sentence, I mean when you read that the prisoner, however great his crime, is made the object of affectionate solicitude; does it not interfere to a certain extent with the effect of the example?—I think that it does.

743. (*Mr. Hardy.*) Would not that be cured by keeping altogether from the public any information of what passes in the prisoner's last hours, in the period between the sentence and the execution?—I am inclined to think not. My belief is that by secresy and mystery, even supposing it be practicable, you would invest him with a new sort of interest, even to a greater extent than that which he has at present.

744. Do you think it is desirable to admit to a prisoner under sentence of death anybody who is not in the discharge of a strict duty, and who would not be bound to keep his conversations with the prisoner from the public?—I do not know what the practice is, but to my mind it would not be right to prevent a prisoner under sentence of death from seeing his nearest and dearest relations. I do not see how you could enforce silence with regard to matters of that sort.

745. Take such a case as a clergyman being admited, who publishes a letter in which he says that he believes that Müller is as innocent as himself?—I quite agree that that is very objectionable indeed, but I think that it is one of the things which you must expect if you invest the prisoner with the interest which Capital Punishment gives him. I look upon it almost as a necessary evil.

746. (*Mr. Waddington.*) What punishment would you impose for such cases as Palmer's, and Rush's, and the Mannings', and those extremely bad cases of assassination, if Capital Punishment was abolished?—My answer to that question is, that there are persons as bad as Palmer, and even Rush and others, who have been acquitted, and that whatever punishment you give them, provided you keep them away from the rest of society, it is better than that they should be acquitted and be able to commit other murders. That perhaps would serve to illustrate what I was going to say. I do not myself entertain a theory as to any new punishment, but there are many cases in which persons whom the world generally believes to have been guilty of very atrocious murders, who have for some reason or other been spared. Something is done with them, and if something is done with as many as have actually been thus treated, I cannot see that there would be

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any difficulty in doing the same with a few more, whatever the number may be, but it would be a very small proportion as compared with those who have not been executed, although they have been found guilty during the last several years.

747. Have you looked at the numbers executed?—In the last few years they have been considerable, but about 10 years ago the number executed used to be a very small proportion of those convicted. Something has been done with them to protect society from them, and society has not been practically injured by those who have been found guilty, but it is open to those who are acquitted to commit fresh murders, and society is injured by them.

748. Then do you mean that there should be no change in the mode of punishing those who are convicted? I am speaking of cases where the prisoners are now executed. If these men were no longer executed, how would you propose to punish them?—I would myself rather not answer that question, because I do not even know exactly what is done at present with those who are reprieved after being capitally convicted. For instance, I do not know how Townley will spend the rest of his time.

749. Do you mean that you cannot form any opinion without knowing that fact?—I mean that I am ignorant of what the present system is.

750. And that ignorance prevents you from forming any idea of what is to be substituted for the present system?—I take the question to be whether I have proposed any alteration in the present system. I have not proposed any alteration in the present system, because I do not know what the present system is.

751. In your opinion what punishment should be substituted in the cases where murderers are now executed? Would you have their sentences commuted as those of the other persons are, or would you have some more severe punishment for them?—I should give them a very severe punishment; the sentence, of course, in cases of the worst murders should be one of imprisonment for life.

752. Ought not that in your opinion to be rigidly carried out, and enforced in the extreme cases of murder which I have mentioned?—I should certainly say that in cases where no discovery is made of any mitigatory circumstance, and there is no reason to suppose that there ever could be any mitigatory circumstance discovered which was not in existence at the time of the conviction, imprisonment for life should always be carried out, but I would not go so far as to say that there are not cases in which persons have been convicted of what is now murder, and what you would, I presume, put into another list, and have been actually hanged, who might possibly if spared have been useful members of society before their lives terminated. I will take the case of that very man Murdock. I do not see why that man, if his life had been spared, should not have become a decent member of society.

753. Do you think that with the view of trying whether such a man would become a decent member of society or not, he should be released after imprisonment, supposing Capital Punishment should be abolished?—I do not wish to pledge myself to an opinion, but I can conceive a case where a man although he has been found guilty of the highest offence known to the law is yet not entirely without hope of amendment.

754. Would you hold out any hope to the criminal?—None whatever.

755. And therefore no mitigation should ever be allowed?—I do not know that that follows.

756. If mitigation were allowed in some cases would it not hold out a hope to others?—It would have that tendency no doubt, but it would

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not hold out a hope perpetually. I think that there are cases in which a man has been found guilty of murder and hanged, who reasonably, and to the interest of society rather than otherwise, if he had been found guilty of an offence punishable not by death, might ultimately have been released and have been a useful member of society.

757. Do you think that that might be so, even in the very worst cases, such as Palmer's, or Rush's ?—No, I do not think so. I do not think that it is likely, but I should be sorry to say that it is impossible ; I do not know that it lies in us to say so.

758. Supposing that Capital Punishment were abolished, in your opinion should the sentence substituted be penal servitude for life or for any lesser term as it is now, in cases where penal servitude for life is the maximum. In every Statute I believe a discretion is given to the Judge to impose a less term of penal servitude, or even imprisonment if he thinks proper. Supposing that Capital Punishment were abolished, do you think that that discretion ought to be given to the Judge ?—I have not thoroughly considered that question, but answering such a question off-hand, I would rather have that discretion with the Judge than attempt to classify and leave the discretion with the jury. I think that the Judge would probably exercise a sounder discretion, and more for the good of society in such cases, than the jury would if a line were drawn by enactment.

759. (*Mr. Attorney-General for Ireland.*) With reference to the highest class of murder, would you leave the Judge any discretion as to the continuance of punishment during life ?—If you once classify, I should certainly not, but if you leave all those offences which are now murder to be still murder, and are desirous that there should be a classification, owing to the difference between one sort of murder and another, I would rather leave that discretion with the Judge than attempt so to define it as to leave it to the discretion practically of the jury.

760. *Mr. Hardy.*) You, in fact, would go back to the old system of having sentence of death recorded ?—Yes, so far as that is analogous.

761. (*Mr. Attorney-General for Ireland.*) And you would leave the sentence of penal servitude to be to any extent and in any case which the judge might think proper, even in the highest cases ?—Yes.

762. (*Mr. Hunt.*) Supposing that Capital Punishment were abolished, and that a prisoner convicted of murder under circumstances of the greatest atrocity were sentenced to imprisonment for life, if he murdered his warder, what would you do to him then ?—I would rather not hang him.

763. What would you hold over him to deter him from murdering his warder, he being at that time sentenced to the most severe punishment which you would award to him ?—I do not see how you can deter him. You suppose a case in which he has murdered his warder ?

764. I suppose that he has murdered a fellow subject in this country, and that you sentence him to imprisonment for life, and that he is working out that sentence either in this country or in a colony under the superintendence of prison officers, and that he murders the officer who watches him, what would you do to him ?—I would take care that he did not murder any more.

765. The same precaution which you would exercise in the case of a second warder one would presume that you would have exercised in the case of a first warder ?—I do not see how you can deter a man simply by saying "I will hang you if you do it."

766. Then I take it that a man who has committed one murder has an impunity for any other crime which he may subsequently commit ?

—No; I do not think that it is an impunity to be imprisoned under the silent system, or whatever it may be, all his life.

767. Under the law which you would establish, he would be imprisoned for life for the first murder which he commits?—Yes.

768. Supposing that he commits a second murder, can you add any other punishment to it?—I do not know that you would do any good by it; you would keep him under a more stringent sort of surveillance, and do anything which you could to prevent the possibility of his murdering anybody else.

769. Do you think that there would be any security for the life of any person in charge of him if you could super-add no other punishment?—I should take care that there was security, and should so guard him that he could not murder any other person.

770. Palin was sentenced to 15 years transportation?—I think so.

771. But five years later he was enabled to commit an assault upon a female for which he was hanged?—Yes; which he would not have done if the punishment had been according to my view.

772. Supposing that that man instead of having 15 years transportation had had imprisonment for life, he would have had just the same opportunities of committing assaults upon others, would he not?—Hardly, I think, because he was transported to Australia, and he was there allowed a certain amount of liberty which enabled him to commit this assault. I would not allow a person convicted of murder any such liberty as would enable him to murder anyone again.

773. You could not sentence a man to imprisonment without having some one in charge over him?—I am not sufficient gaoler to know that.

774. It would be impossible to imprison a man for life without somebody supplying him with his food?—Yes.

775. And that person would always be liable to an attack from his prisoner?—I do not see why.

776. How would you prevent it?—By physical means, by chaining him, or caging him, or doing anything that was necessary.

777. Would you chain his hands and feet to the wall or would you put him into a cage?—This is a sort of question to which I have not at all directed my attention. I am not a practical gaoler. I am not a magistrate. I know nothing whatever about this part of the case. My opinion is given with reference, of course, to the supposition that that can be done in this country which is done in other countries, and which, as I understand in other countries, is found to be far better for the security of mankind than our system of Capital Punishment, and I cannot suppose that we are unable to do the same, and that there is anything in the mere fact of a prisoner being an Englishman which should make him more unmanageable than an American, or a Belgian, or a Portuguese, or a man belonging to any other country. I suppose there are methods by which substituted punishments for Capital Punishment may be made effectual and may protect society. All that is matter of practical knowledge of gaol work and of magistrate's work, which I do not possess.

778. As I understand, you propose to abolish Capital Punishment. I want to know what you propose to substitute for it, and I understand that you propose imprisonment for life?—Some sort of imprisonment for life; that is the best answer which I can make to the question without committing myself, because it is not a kind of question upon which my authority is worth anything at all. I should say, substitute the best known system which has been found as a substitute in any other country.

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779. What substitute will provide security for the persons in charge of the prisoners?—In order to answer that question I must have a knowledge which I do not possess, namely, the knowledge of a gaoler, of a magistrate, and of a Home secretary combined almost.

780. Would you substitute a punishment which I should consider a species of torture. Would you confine a man by irons, or put him in a cage?—I would substitute any punishment which is essential for the prevention of crime, and for the safety of society; but I am not myself gaoler enough, or magistrate enough, nor have I any such practical knowledge, as to enable me to say what the punishment should be. I should go to all the countries in the world, and search for the best substitute which I could find. I understand that it is practically found without difficulty, and I should certainly hope to find it so from the knowledge which I have had of cases in this country, in which persons have been capitally convicted, and in which practically they are so dealt with, that we never hear of their committing murders again.

781. (*Mr. Waddington.*) What are the countries in which you say Capital Punishment has been abolished, and produced such great effects?—I am told that it is abolished in some of the States of America. In Belgium, though it is not actually abolished, yet it is practically so, and the statistics have shown a great diminution of crime.

782. Are you aware that in the larger States of America a very strong agitation has been going on for a great number of years, and that they have never been able to obtain the abolition of Capital Punishment, that is to say, in Pennsylvania, and Massachusetts, and New York?—I take these cases very much from hearsay, and from people who possibly have not gone very deeply into them. But these are just the questions which I apprehend this Commission is going to look into, in a far more careful way than anybody could be expected to do without being on the Commission himself.

783. (*Chairman.*) Upon the question of a new trial are you of opinion that in any of these cases a new trial ought to be allowed?—My view of that matter is that but for Capital Punishment the clamour for a new trial would be altogether done away with, and that the Home Office would be a perfectly satisfactory tribunal for all practical purposes, and that by abolishing Capital Punishment you would get rid of the only instance in which a strong case for a new trial is made out. I have stated already that I do not myself believe that in my experience I have ever seen a man improperly convicted. I have seen a great many improper acquittals, but I suppose that no one would suggest that there should be a new trial where there has been an acquittal. *Neminem bis vexari* is a motto to which I suppose that we all should wish to adhere.

784. But upon the supposition that Capital Punishment continues, would you be of opinion that there ought to be a new trial?—I think that it would be very hard to resist it then. I would, however, still adhere to the present system. I think that a new trial would be so mischievous, and of such immense advantage to the rich man, to the apparent detriment of the poor, that upon the whole it would be a scandal.

785. (*Mr. Waddington.*) Would it not in capital cases be a mere delusion? Do you think that it would be granted in any case?—Probably not. It might be granted upon false affidavits, and I think that the second trial would be worse than the first.

786. Can you mention a case of murder which you have ever known or heard of in which you think that a new trial would have been obtained?—I do not know what might have appeared upon affidavit.

787. Do you think that the Court would listen to affidavits when the persons might have been called at the trial? Would not that in itself be an enormous evil?—No doubt. My opinion against new trials is quite as strong as my opinion against Capital Punishment.

788. (*Chairman.*) Supposing Capital Punishment to continue, are you not of opinion that the present mode of investigation by the Home Office is upon the whole satisfactory?—I think that it is as satisfactory as any other mode which can be devised. When I say "satisfactory," I must say that where you have a case of Capital Punishment it is almost impossible that anything should be satisfactory.

789. (*Mr. Waddington.*) You mean that it is impossible it should give satisfaction to everybody?—Or be satisfactory. I never feel satisfied at a man being hanged.

790. (*Mr. Hunt.*) You used the term, "clamour for a new trial;" do you think that there is any strong public opinion in favour of having a new trial?—My own feeling is that the public opinion may be very strong, but that it is based upon a very superficial consideration of the matter.

791. Do you think that there is a strong public opinion?—I should hardly call it an opinion. I think that it is formed so superficially, and by people who know so little about it, that it is scarcely to be called a strong public opinion. I think that there is a strong off-hand opinion, a clap-trap opinion.

792. Do you mean among the public generally, or among the profession?—I think rather more among the public than among the profession. I think that among those who have practised in the criminal law the opinion is that things had better be left as they are.

793. You do not find petitions to Parliament upon the subject?—No. In a former part of my evidence I said that in cases of Capital Punishment it seems as if almost everybody was in a sort of conspiracy in favour of the prisoner. That applies very strongly to medical witnesses You find that medical witnesses are induced to give opinions which are perfectly startling to Judge and counsel in cases where you can attribute it to nothing but the existence of Capital Punishment.

794. (*Mr. Waddington.*) You mean in cases where the defence is insanity?—Yes, or in cases where the question is whether the death was caused by a particular wound.

795. (*Chairman.*) Or by poisoning?—Yes.

796. (*Mr. Neate.*) Would you say that you have noticed in the medical profession generally a disinclination to contribute to Capital Punishment?—Yes; according to my belief, I have very strongly.

797. (*Mr. Ewart.*) Is there not a difficulty in the execution of Capital Punishment arising from the conflict between modern medical opinions upon the subject of insanity and the legal definition of it?—I think that the quantity which has been said and written upon the subject by skilled witnesses tends to give additional weapons to a defending counsel, and that the more there is written, and the more conflict of opinion there is, the more chance there is of the escape of the prisoner in cases of insanity, as well as in cases of poisoning.

798. I have understood, from what I have seen of trials, that the medical definition of insanity is at variance with the received legal definition of it by the English law?—Yes.

799. (*Mr. Attorney-General for Ireland.*) The opinion of Dr. Forbes Winslow in the Macnaughten case and the decision are certainly at right angles?—Yes.

800. There being the doctrine of an uncontrollable impulse on the one side, and the necessity of knowing the distinction between right

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and wrong on the other?—Yes. I have several notes of cases in which there have been acquittals upon the ground of insanity evidently against the opinion of the Judge. Those are cases of child murder, and they stand upon an exceptional basis, and I suppose the commission will not desire to go into them now.

The witness withdrew.

Lieut.-Col. E. W. Y. Henderson.

Lieut.-Colonel E. W. Y. Henderson examined :

801. (*Chairman.*) Will you have the kindness to state to the Commission whether you have at all taken into your consideration the question of Capital Punishment?—It is a subject which has been forced upon my attention for a considerable number of years ; ever since I was appointed to the convict service, which was in 1850.

802. Have you been in the convict service from the year 1850 to the present time?—I have.

803. In which colony?—I was in the colony of Western Australia up to 1862.

804. During that time had you ample opportunity of seeing the condition of the various criminals there?—I had very intimate opportunities of becoming acquainted with their sentiments on the subject, and with the practical working of the punishment of death.

805. Will you have the kindness to tell the Commission what opinions you have formed upon those questions?—I think that I have formed the same opinion as almost every person has who has come into immediate contact with the criminal classes, namely, that the fear of death is the strongest deterrent which you have. There is no question, especially with the lowest classes of the criminals, that they share that characteristic with the lower animals ; the strongest passion which they have is the love of life, and the fear of losing that is of course the greatest deterrent. They will always calculate the chances to a certain extent, and of course the certainty of the punishment is a very great element in properly understanding the case.

806. The more important question is not, abstractedly speaking, the fear of death, but how far the fear of death prevents the commission of crime?—I should say that the certainty of the punishment is almost everything. In Western Australia the crime of rape, the crime of assault with intent to commit murder, whether death ensued or not, and the crime of burglary with violence, being armed, were all punishable with death. At the outset we found that there was a very strong tendency on the part of the convicts to assault their officers ; there were several very bad cases, and it was determined by the Governor in Council to put the law in force in the next case. A very bad case occurred : a warder was cut down with a spade by a convict ; he did his best to kill him, and it was a miracle that he did not kill him. That man was hanged ; and from that time that crime may almost be said to have ceased ; we never had any more trouble. It was the same with rape. The convicts were dispersed all over the country, and the women, and especially the children, were very much at their mercy, and there was a good deal of rape. It was determined to put the law in force with respect to that crime, and we almost succeeded in stopping it.

807. (*Mr. Waddington.*) How many persons were executed for it?—There were four or five executions, as far as I recollect.

808. (*Mr. Hunt.*) What punishment had you inflicted before, in the case of rape?—There was nothing but penal servitude over again.

That is precisely what we felt, and what I think is the great difficulty, that there is no alternative punishment but the punishment of death for those crimes. *Lieut.-Col. E. W. Y. Henderson.*

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809. (*Chairman.*) Is it not the case that in those countries of which you are speaking, the masses of the people are very much unprotected, and, consequently, are very desirous by strong punishments to prevent such aggressions, stronger punishments than would be necessary in England ?—No doubt the circumstances of the colony rendered it necessary. I only mentioned those cases to show that directly the convicts saw that we were in earnest they ceased to commit that particular crime.

810. (*Mr. Ewart.*) Was it from the convict being convinced that he would be certainly punished with death?—Yes ; no doubt of it. Palin was the most atrocious scoundrel that ever was hanged. He broke into a house ; he had a bludgeon. I do not think that I ever saw such a weapon in my life ; it was studded all over with sharp-pointed nails. There was a lady sleeping at one end of the house, and her brother-in-law at the other ; she woke up in the middle of the night and found Palin standing by her bedside with his face masked ; we never exactly understood whether she was criminally assaulted or not ; we did not like to press her upon the point. I believe that it was not the case, but he was restrained from the fear of being hanged ; he placed his hand upon her to put her down into the bed ; there was no question that he entered into the house with the intention of committing murder if necessary, but he robbed the house and went away. In the morning they put the natives on his track, and they traced him as nicely as possible to his own house, and he was hanged for burglary with violence, being armed ; the putting of his hand upon the lady constituted violence. I saw a letter which he wrote to his friends in which he acknowledged the justice of his sentence. I told every batch of men that I had that they would be hanged for those crimes. He said that it was perfectly right that he should be hanged, and that he ought to have been hanged for a murder which he had committed in England five or six years before. That letter I saw myself.

811. In that country the punishment was positively certain ?—No doubt.

812. That would not be the case in a country like this, where the punishment is uncertain ?—English juries positively require definite proof of murder ; but, as far as my knowledge of the state of feeling goes, I think that most English juries, if the case is clearly proved, are quite ready to bring in a verdict of murder.

813. Are not greater efforts made in this country to preserve the life of a criminal than would probably be the case in a colony such as you describe ?—Yes, Palin's case is an instance.

814. Depending upon the uncertainty of carrying the law into effect ?—I think that English juries positively require clearer evidence than they do in the colonies.

815. (*Mr. Neate.*) Admitting what you say, that probably the lower order of criminals are more alive to the fear of death than to the fear of any other punishment, do you think that that fear operates upon them to the same extent at the time of the commission of the crime. Cannot you conceive that the man who is most afraid when he comes to be hung is just the man who thought least of the consequences when he was going to commit the crime. Do not you judge of the liability to fear, on the part of those with whom you officially come in contact, from their feeling when the punishment is about to be inflicted ?—No ; I do not think so.

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816. Then is it from their conversation that you judge of it? What induces you to say that the criminal is more alive to the fear of death than to the fear of any other punishment?—Because it is my belief that the love of life is the strongest feeling which those persons have.

817. What is your reason for that belief?—I do not know that I can give you any specific reason.

818. Is it not from their danger when they are about to be punished?—No; I think not. I have never myself witnessed an execution.

819. But you think that it is rather from the effect of the threat of punishment when it is certain to be carried out. You infer that the criminal is more alive to the fear of death, because you have found that certain offences ceased when he was threatened with certain death?—Yes.

820. In that case the punishment would follow very quickly upon the offence, would it not, particularly in the case of striking a warder?—Yes.

821. The prisoner who did that must have known that he would be hanged within a week or even a less time?—Possibly a fortnight or three weeks.

822. The punishment of death in that case would follow with certainty if there was no doubt about the offence, and almost immediately?—Yes.

823. Cannot you conceive, or from your study of mankind do you not believe, that it very commonly happens that the man who is most overcome with the fear of death when it comes upon him, is the very man who would think the least of it if it was said to him, "Now "if you do that you will be hanged"?—No, I should not say that it was so in a general way.

824. (*Mr. Hardy.*) I have understood you to say that the change of the punishment to death had the effect of stopping certain offences?—Just so.

825. The punishment before that, I suppose was additional hardship in penal servitude?—It was merely a prolonging of penal servitude.

826. Was there a certainty to those who committed these offences before, that if they were not hanged they were certain to get some punishment?—Yes.

827. And that as I understand did not prevent the offences?—No.

828. (*Mr. Waddington.*) Supposing that Capital Punishment were abolished, it would be necessary I suppose to confine the greatest criminals for life?—Precisely.

829. Do you conceive that it would be possible to let them out again after commiting attrocious murders. Can you conceive that they would ever be so reformed by an imprisonment for a length of years that they might safely be let out into society again?—There is a considerable number of them no doubt who ought never to be admitted into society again; the man Palin ought never to have been let loose upon any society.

830. He was a man who if convicted ought in your opinion to have been imprisoned for life?—No doubt.

831. Is there a considerable difficulty in dealing with prisoners who have no hope of a remission of their sentence?—I believe that the punishment of imprisonment for life is hardly known in England, and certainly in my experience there would be only one way of treating a man whom you shut up without hope, namely, simply to treat him like a wild beast, because you have no power over him; it does not signify what he does, or does not, you cannot do any more to him, you can

beat him, or you can half starve him, but then there is a limit to that, you must not put him to death, and therefore you must not starve him outright. They know that perfectly well. The men who got no remission under the Act of 1853 said, "We do not care, you can do "nothing to us, we must stay here all our time whether we behave "well or not." If you apply that to imprisonment for life, it must either end in insanity, or drive the men to such a state of desperation that they will commit some offence for the very sake of getting out of it.

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832. Have you now in your convict prisons in England a considerable number of persons under sentence of penal servitude for life?—Yes.

833. I suppose that all those persons have a hope that at some future time by good conduct and industry they will get out of prison?—Yes, they all have the hope, and I believe that it would take a century to prove to the criminal classes that you were in earnest, and that you would keep them locked up; not one of them would believe it. All those men now under sentence of penal servitude for life are told that they can expect no remission whatever, but they do not believe it, they know perfectly well that 10 or 12 or 14 or 15 years hence, their cases will be brought forward, and that the crime will be almost forgotten; they are quite sure that something will happen, and that they will be released.

834. They struggle on, and hope for a mitigation in due time?—No doubt of it, and if you give them no hope you simply reduce them to the state of wild beasts, the only thing then would be to send them to a lunatic asylum where they would be kindly treated and made comfortable.

835. Do you think that any number of prisoners in that desperate condition, and with no hope, could be confined with safety to the warders?—You could only do so by treating them as you treat the wild beasts in the Zoological Gardens.

836. (*Mr. Neate.*) Supposing that a separate provision was made for those persons convicted of murder, and that they were kept in a prison apart, then unless the crime increased very much would they not be so small a number that there would be no difficulty in making a special provision for their safe custody?—That could be done.

837. There would be no difficulty as to the safety of the warders in that case?—Of course they would have to take their chance. We have men now who are very little removed from wild beasts,—will not say that they are mad, but they can never be approached by one man at a time; they are more or less obliged to be treated like wild beasts, but the warder always goes with, as you may say, his life in his hand.

838. Assuming that you inflicted the punishment of imprisonment for life, a man would not be kept all the time at the highest point of punishment which he would be able to bear at a time, it would always admit of temporary aggravation in the case of any fresh offence, would it not, according to the present system?—What you can do to a man inside a prison is very limited; you lock him up and you must feed him and you must clothe him.

839. Is not the punishment of a dark cell for a man felt as a very great aggravation even in the case of those who are imprisoned for life?—That is merely a punishment for prison offences; it is a question whether you could add that to a sentence of imprisonment for life.

840. According to the system of prison discipline there are temporary aggravations which might be enough in the case of any violent outrage, and I presume that with that class of prisoners there would be less difficulty in allowing the warders who approach them to be always being armed?—That could be done, but then you come to a system of perpetual

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imprisonment and repression; you have nothing to induce the man to get into a better state of mind, and how you can possibly think that by locking up a man for 25 or 30 years under such a system, you make him fitter to go into the presence of his Maker than by giving him a fortnight or three weeks to make up his mind, and repent, is beyond my comprehension.

841. I am speaking of an imprisonment for life, which would admit of some mitigation consistent with imprisonment?—It is very difficult to say how practically you could mitigate it.

842. Even in the case of a murderer after he had been in prison for 12 or 15 or 20 years, might he not be allowed the relaxation of cultivating a garden, or some less irksome labour than he had before had, or greater liberty of conversation, might he not have something to soften his mind before he went out of the world?—I am afraid that if you shut out the element of hope all your efforts at reformation would be in vain.

843. I do not shut out entirely the element of hope. From your experience of the criminal classes, do you conceive that imprisonment for life, without hope of mitigation, would be looked upon as a very dreadful punishment?—Yes, if you could induce them to believe it.

844. Imprisonment for life without any hope of liberation would be looked upon as a very dreadful punishment in your belief?—I believe that it would.

845. (*Mr. Waddington.*) And would it not in point of fact be a most dreadful punishment?—Yes, it is beyond my comprehension. I do not think that you could ever get them to believe it.

846. You are aware, I believe, that in most of the Australian colonies the execution takes place within the walls of the prison, and not in public?—Yes.

847. Have you considered that question?—Very often. I have not been in the other colonies, and what I know upon the subject I know merely by reading reports, and from what I have heard, and I have a very strong opinion that executions in private are far preferable to those in public. I have always held that the security which they have of a coroner's inquest is perfectly satisfactory. It is perfectly satisfactory in the case of a citizen who is found with his head off, the public are perfectly satisfied with the verdict of a coroner's jury, and it is the same with a man who has been killed in course of law, the jury give their verdict and the public are satisfied. It has been found to work remarkably well in the other colonies, and I was always very anxious that it should be introduced into Western Australia.

848. (*Chairman.*) Was it introduced into Western Australia?—No.

849. You had public executions?—We had public executions, but they were only attended by the very lowest of the population. I asked a very intelligent man, who had been a convict, what was the general feeling with regard to public executions; he told me that the mass went there merely to see it, like any other spectacle; that the first appearance of the convict on the scaffold made him rather sick, but that the actual execution was rather pleasant and satisfactory than otherwise, and that he went away satisfied—that it was rather a relief, but that it did not impress the spectators beyond that.

850. (*Mr. Neate.*) They were glad that it was over?—Yes.

851. (*Mr. Waddington.*) Is there anything further which you would wish to state to the Commission?—I do not know that there is.

852. (*Mr. Attorney-General for Ireland.*) Your experience of convicts in this country does not lead you to give any opinion as to the effect of Capital Punishment upon the criminal class?—No, I am not so immediately mixed up with them as I was. I had better opportu-

nities of being acquainted with their peculiarities when I was out in Western Austalia.

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853. (*Mr. Neate.*) Have you any opportunity of knowing what are the opinions or feelings of the convicts with reference to any alteration of the law; do you know whether they have ever discussed the subject among themselves?—I cannot say that I do.

854. (*Mr. Hardy.*) In your opinion would private executions be even more deterrent than public ones?—Most decidedly. The fact of the man disappearing from the court of justice, and of the people knowing that he never would be seen again, would be far more deterring. I believe that a public execution destroys the whole value of an execution.

855. (*Mr. Neate.*) The convicts may not see the newspapers, may they?—No, they never see them.

856. (*Mr. Hardy.*) In some places the persons who are in prison are compelled to witness the execution, where it is a private execution as regards the public, the prisoners are compelled to witness it. Do you think that that would be an advantage?—Certainly not. It is the same with flogging; we found that flogging criminals in public had not half the effect which flogging them in private had. All our corporal punishments were carried on merely in the presence of the officials of the prison and the surgeon, but not in the presence of the convicts.

857. The spectacle causes a sympathy which supersedes its beneficial effect?—Yes; the very sight of the exhibition destroys the feeling which you want.

858. (*Mr. Waddington.*) I suppose that if it were done frequently in public, and the convicts were called out, so as to make it very familiar to them, it would lose very much of its effect?—No doubt.

859. (*Mr. Ewart.*) Flogging in public would lose its effect, would it not?—Yes.

860. (*Mr. Neate.*) Do you consider that the criminals, as a class, are very much below the average of mankind in natural goodness of disposition?—Yes, as a class, I think that English convicts certainly are.

861. You meet occasionally with men apparently of good natural disposition, do you not?—Yes, occasionally you do, but they are the exceptions, certainly.

862. Most of them are bad subjects naturally?—Almost all those who are convicted of serious crimes are, there is no question of it.

The witness withdrew.

Mr. Thomas Kittle examined:

Mr. T. Kittle.

863. (*Chairman.*) Be so good as to tell us what situation you hold in the police?—I am an inspector of police.

864. How many years have you been so?—I have been in the police seven years.

865. Is it a part of your duty to attend public executions?—I have done so upon duty.

866. Have you attended many?—Upon duty not more than three.

867. But have you done so when not on duty?—Many more than that.

868. With respect to the class of persons who attend to witness an execution, who are they, generally speaking?—Thieves, fighting men, costermongers, labourers, a few artizans, and I have noticed a few soldiers there.

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869. There are a good number of women, are there not?—Not a great number of women generally; there is a small per-centage of women.

870. (*Mr. Neate.*) By labourers you mean bricklayers' labourers, and that class?—Yes; I have noticed bricklayers' labourers there in rather large numbers.

871. (*Chairman.*) In addition to those whom you have mentioned, are there not persons of a superior class who attend when an execution excites great public attention?—Yes; but they do not mix with the crowd; they take windows opposite.

872. There are a good many of that class at times, are there not, at the executions which excite great interest?—Yes, there are a number at those times.

873. (*Mr. Ewart.*) Are there more than there used to be, or fewer?—About the same number. The windows seem to be all occupied, and I have always noticed the same class of people. On the last occasion there were several windows which were not occupied; they were not absolutely closed, but there were no occupants. I refer to the execution of Müller. I witnessed that execution.

874. (*Mr. Waddington.*) Were you in command? Did you make the arrangements?—No; I did not.

875. (*Chairman.*) Are large sums of money paid upon those occasions for the use of the windows?—I have been told that as much as 25*l.* has been paid for the windows of one room.

876. Are you aware at all of the sort of impression which is made upon the persons who so attend these public executions, whether they excite much fear or not?—I do not think that the witnessing an execution excites any fear.

877. Not among the lower class of people?—I think not. They look upon it much as they would look upon any other exhibition for which there is nothing to pay to see. I think that they look upon it as they would look upon a prize fight, or any other exhibition of a like nature.

878. An execution is a matter of interest to them to witness?—I think so.

879. (*Mr. Neate.*) Do you mean to say that you do not see any seriousness and anxiety about them?—There is a sort of anxiety and a straining to see the movements of the doomed man and the officials.

880. Do you see men turn pale at all?—I have never noticed that, and I have watched their faces most intently.

881. (*Chairman.*) Does not it frequently happen that offences are committed almost under the gallows itself, such as picking pockets and offences of that kind?—It frequently occurs that pockets are picked, but as a rule persons do not go with any valuables about them to see an execution.

882. Do such of the populace, as attend generally, show any feeling of terror or of solemnity in consequence of witnessing the execution, or do they keep talking and chatting just as if nothing was the matter?—I think that they seem to amuse and rather enjoy themselves previous to the sight which they come to see.

883. Are there any other matters relative to these executions respecting which you can give information to the Commission?—There is a wide difference in the behaviour of the crowd at the Old Bailey and at Horsemonger Lane gaol.

884. In what respects?—At the Old Bailey the mob have it all their own way, there is no sort of control put upon them, and they go

into all sorts of excesses which they are not permitted to indulge in at Horsemonger Lane gaol. *Mr. T. Kittle.* 1 Dec. 1864.

885. I suppose there are a good number of drunken people present at the Old Bailey ?—I cannot say that I have noticed many cases of actual drunkenness; but the women are generally under the influence of liquor, and they seem to have been out all night.

886. They are excited by liquor, but not absolutely drunk ?—Yes.

887. (*Mr. Waddington.*) Is it owing to the police arrangements which are made at Horsemonger Lane gaol that this difference, which you have mentioned, arises ?—I think so entirely. At the Old Bailey there are barricades or pens erected in the streets from which the execution can be witnessed, and the people are allowed to occupy these pens without any control whatever, the consequence is that they wedge themselves so closely together that they are literally packed, and could not extricate themselves if they wished to do so, nor could any person pass to any spot inside. I have seen boys and lads passed over the heads of the crowd for a considerable distance; they could not get down, because the mass of human beings was so great that they could not come to the earth at all, they had to be passed to the outskirts of the crowd before they could get to the ground. But at Horsemonger Lane the crowd is never allowed to congregate so densely, the police arrangements prevent it.

888. (*Mr. Neate.*) Is the crowd at all differently composed at Horsemonger Lane gaol ?—No; the spectators are precisely of the same class, but still they are not allowed to congregate in the numbers that they are at the Old Bailey.

889. (*Mr. Hardy.*) Does that arrangement render them more quiet and orderly ?—I am sure that it does, because if there are any cries for assistance the police at Horsemonger Lane can proceed to the spot immediately, but at the Old Bailey they cannot do so. At the Old Bailey the police cannot go to the spot neither can any of the occupants withdraw unless they go over the heads of the others.

890. (*Mr. Hunt.*) Do you hear the conversation of the crowd upon these occasions ?—Yes; I have noticed it frequently, and have put it down in my diary.

891. Do you hear any expressions of compassion, or of satisfaction at the criminal meeting with his doom; what are the observations which they make with reference to him ?—I never heard any expression of compassion towards the criminal.

892. (*Mr. Neate.*) Were you at Wright's execution ?—Yes.

893. Did you hear no expression of compassion in Wright's case ?—I did not.

894. (*Mr. Waddington.*) Did Wright's execution take place at Horsemonger Lane ?—Yes.

895. (*Mr. Hunt.*) What is the general nature of the observations respecting the criminal and his execution ?—In the conversation which passes between these persons, they generally make use of slang terms.

896. But you understand them, I suppose ?—I perfectly understand them; I have noted two remarks made by observers at the late execution of the pirates. I was there on duty, and I noticed particularly two costermongers who were proceeding to the execution, they were going up Snowhill, I believe, and one said to the other, "So help me God, "Bill aint it fine, five of them and all darkies." The answer of the other, man was "It is so, and I should like to act Jack Ketch to them "———," That made a particular impression upon me, and I put it down in my pocket book at the time.

897. (*Mr. Ewart.*) You do not think that an execution is a great

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moral lesson, do you?—I do not know as to a great moral lesson, but I believe that it has a deterring influence in the commission of murder.

898. (*Mr. Hunt.*) In their own language do you hear an expression of satisfaction at the murderer meeting with his death?—Frequently I have done so.

899. Amongst the lowest classes present?—Yes.

900. (*Mr. Neate.*) In what form have you heard that feeling of satisfaction expressed, that the man was justly put to death?—I may say that adjectives are frequently inserted; they say that it serves him right, and they are very much pleased, and that it is just what he deserved, and so on.

901. (*Mr. Hunt.*) Do you think that they feel safer from its being the law that a murderer will be hanged; do you think that they have a notion that hanging a man for murder makes life safer in this country?—I really cannot think that that enters into their calculations, but I believe that the idea of their having this doom hanging over them if they commit murder has a deterring influence upon the lower class of the people.

902. What makes you think that, is it from anything which they have said?—From their love of life.

903. Is it from anything which you have heard any of the criminals say themselves?—Yes; I have heard them say it. I have heard them make remarks upon that sort of thing that they should not like to be scragged.

904. Can you give us any instances to illustrate that?—Only from casual conversations which I have heard amongst them, and have noticed. I have heard them say that they would rather be transported three or four times over than they would be hung, that they did not mind for the jug.

905. That means the gaol?—Yes; but that they had a great horror of being scragged, these are the terms which they use.

906. (*Mr. Neate.*) Were these people who had been criminals, or who were likely to be criminals?—I should say both.

907. (*Mr. Hunt.*) What you would call men of the criminal class?—Yes.

908. (*Mr. Attorney-General for Ireland.*) Where have you heard those expressions?—Under different circumstances, I mix frequently with crowds, at theatres and different places. At executions I have looked at the upturned faces of the whole crowd, I have been elevated above them, and I have also noticed the faces of a crowd of the lower classes at a theatre, and I cannot find any difference, they always seem to be identical in the two cases; it appears to me that they look upon a theatrical scene precisely in the same way as upon an execution.

909. (*Mr. Hunt.*) Do you mean that the persons at a theatre would be of the lower class?—Yes; I am speaking more particularly of the upper gallery of Drury Lane Theatre. I have been every night there upon duty; knowing the piece myself, I have felt no interest in it, and I have looked at the expressions of the faces of the crowd.

910. But you would not have so low a class of persons at a theatre as at an execution, would you?—I think that it would be identically the same class at the place named and at minor theatres.

911. (*Mr. Ewart.*) Do you recognize any of the same persons?—Yes, from their dress; they are the same class of persons precisely.

912. (*Mr. Attorney-General for Ireland.*) There is no greater solemnity in the case of an execution than in the case of a theatre?—I think not.

913. (*Mr. Neate.*) You are speaking of a tragic piece, I suppose ?—Either a tragic piece or sensation scenes.

914. There are a great many tragical pieces—the "Colleen Bawn," and so on ?—Yes ; if they are waiting for the finale.

915. An execution produces apparently the same effect upon them as a tragic scene at a play ?—Precisely the same.

916. (*Mr. Hardy.*) Has it ever come to your knowledge that a criminal, in the commission of a crime, has been deterred from going to the length of murder on account of the probability of the punishment of death ?—Not from my own personal knowledge ; but from what I have heard, and from conversations which I have had with different men in the police, I believe that the sentence of death has a strong deterring influence upon criminals in preventing their committing the final act of murder.

917. (*Mr. Neate.*) Will you give us these conversations as well as you can ?—They are of a general character as to their horror of death ; their usual term is "scrag" or "choke."

918. That is after they are apprehended ?—Yes.

919. Have you been at all at the haunts of the criminal classes who are at large ?—Yes.

920. Have you ever heard them talk about the penalty to which they might be subjected if they were found out ?—No ; I cannot say that I have.

921. Do you know that they have taken any interest in the discussions in the House of Commons with regard to the abolition of the punishment of death ?—No ; I do not know that that ever enters into their minds.

922. (*Mr. Attorney-General for Ireland.*) You said that you knew from conversation that people had been deterred from committing crime by the fear of death. Can you give any special occasion on which you heard that said, or can you state anything about the circumstances ?—Only from hearing casual conversations between these men, waiting at the police court, for instance, previous to the doors opening ; a certain portion of the criminal classes get together and converse about these matters ; it is only from hearing casually, and taking notice, that I can speak, but not from being at their private haunts where they live.

923. (*Mr. Neate.*) By the "haunts," I meant the public houses which they frequent ?—I have heard them under those circumstances.

924. And you have heard them talk about the punishment to which they might be subjected ?—Yes.

925. Can you tell us at all the nature of the observations which they have made ?—I cannot exactly state any actual conversations, but my idea has always been that they treat the punishment lightly in other cases, but that in their own they have a great horror of being executed.

926. You mean that they treat it lightly till they are caught themselves ?—Yes.

927. And when they are caught they feel it very much ?—I think so ; and that they prevent as much as possible their being caught.

928. (*Mr. Waddington.*) Have you ever heard any of them speak of the greater chance of being acquitted if tried for murder than if tried for any other offence ?—Never.

929. Heve you any reason to suppose that any such idea prevails among the criminal class ?—I think not.

930. (*Mr. Hunt.*) Do you think that there is a general opinion amongst the criminal classes that they will be convicted if the evidence

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is sufficient? Do you think that they rest their hopes of getting off on any squeamishness with regard to hanging a man?—No; I cannot speak upon that.

931. Does the conversation which you hear outside police courts, or anywhere among the criminal classes, ever turn upon the chances of a man getting off who is tried?—I believe that these people always calculate the chances as being very much in their own favour.

932. Do you know upon what they rest the chance of getting off?—Upon the various circumstances or technicalities which they know so well; they frequently contemplate them while they know that they are guilty.

933. (*Mr. Hardy.*) You are speaking of all cases?—Yes.

934. (*Mr. Hunt.*) I am speaking of Capital Punishment?—I cannot say.

935. (*Mr. Attorney-General for Ireland.*) You think that there is no difference in their estimate, whether they are capital cases or non-capital cases?—I think not.

936. (*Mr. Neate.*) You never heard them say that the jury would not find them guilty because the punishment is death?—Never.

937. (*Mr. Waddington.*) I suppose that they chiefly reckon upon their having a good counsel to bamboozle the jury?—There may be something in that, but I cannot speak to it.

938. (*Mr. Hunt.*) You witnessed Müller's execution?—I did.

939. Did you hear any conversation amongst the criminal classes with reference to his case before he was found guilty?—No, not amongst the criminal classes, further than the general excitement which there was with regard to the case.

940. I did not mean among the public, but among persons who were of the criminal class?—I heard it frequently said that he ought to be hanged. I believe the impression was that he was guilty.

941. And they said that he ought to be hanged; that was the way they talked of him?—Yes. When he arrived in the van at Bow Street I was present, and I heard it said that he ought to be hanged, that there was no doubt that he was guilty, from the circumstances which were then being brought forward before the public.

942. Do you think that there is any opinion among the lower class that a man who is guilty ought not to be hanged?—I believe that they consider it a just punishment for a desperate deed; that is my impression.

943. You do not think that there is any opinion amongst the lower classes that death ought not to be the punishment for murder, but that there ought to be a lighter punishment than death?—No; I think not.

944. You never heard that expression?—I never heard that expression, but I have frequently heard it said that "If it was not for "swinging for you, I would murder you."

945. (*Mr. Neate.*) The feeling of the lower class, so far as it is favourable, assuming, as I admit, that it is favourable to Capital Punishment, is rather on the ground of justice, is it not, than on the ground of security. They say "That man deserves to be hanged," they do not say, "If he is hanged we shall be all the safer"?—I do not think that that enters into their calculations.

946. It is more that he should be hanged because he deserved it?—I think so. I may mention that I have frequently heard in different situations in which I have been, the remark with violent oaths and with the fist raised, and under various circumstances, "If it was not "for swinging I would kill you," "I would stick you," and all that sort of thing, "I would murder you if it was not for swinging for

" you." I have frequently heard that, both in crowds and on other occasions. I believe that the persons who used those expressions were in the heat of passion, and that the only thing which restrained them was the fear of the punishment which would follow.

947. They might speak of that, it being the present punishment, but, supposing that the punishment was not swinging, but imprisonment for life, do you not think that they might say, just in the same way, "If it " was not for being shut up for life I would take your life " ?—I do not think so, because the hardened criminals who have seen the inside of a gaol, and know the working of it, have not, I think, anything like such a horror of confinement as they have of the final doom.

948. (*Mr. Attorney-General for Ireland.*) Do you not think that people who have been in gaol, and who have suffered penal servitude, have a very strong horror of it ?—I do not believe that they have. I do not think that they have any great fear of being again confined.

949. (*Mr. Waddington.*) They always expect to get out again, I suppose, for some reason or other ?—Yes.

950. If they could be made quite sure that they would be confined for life, would they not have a great horror of it ?—I do not think so; even if they were confined for life, they would say, "I am better off than I " was when at liberty." I think that that is their feeling.

951. (*Mr. Attorney-General for Ireland.*) You do not think that penal servitude frightens these people very much ?—I think not.

952. Would not a sentence of 15 years penal servitude be a very terrible thing to a man ?—I do not think that they have a dread of it at all.

953. (*Mr. Waddington.*) Do they not make great efforts to escape it ? —Yes ; but immediately a convict is liberated upon a ticket of leave or a licence, he commits crime within a few hours of his liberation, and he is again sent to gaol.

954. That applies only to a few of them, you do not mean that they all do so ?—They are not all discovered, and I do not mean to say that they are all equally guilty, but I mean to say that a very large number very shortly after being liberated commit crime.

955. (*Mr. Attorney-General for Ireland.*) Does not that result very much from there being no place to shelter them, and their having no food to eat, nor any person to take care of them when they are released? —I think not, because they have a certain sum of money due to them which is paid to them at the time or shortly after their liberation, and they commit crime before that is expended.

956. (*Mr. Neate.*) Have you had an opportunity of observing the demeanour of convicts immediately after they have been brought back to prison, after they have been sentenced to a prolonged period of penal servitude ?—I have seen them at the sessions.

957. I mean after their sentence has been passed ?—Yes; I have seen them treat it in the most careless manner, even when leaving the dock.

958. Is it generally so ?—No, but some of them seem to treat it with a sort of stolid or careless indifference.

959. (*Mr. Waddington.*) Supposing that for murder in general they only expected a sentence of imprisonment, do you believe that murders would be more frequent than they are now ?—I firmly believe so, and I believe that if a desperate character knew that his punishment was only penal servitude for life, he would not hesitate to commit murder to liberate himself from the custody of the policeman who had him in charge, and I know that that is the feeling of the police generally.

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960. We have heard and read that there is a great deal of obscene language and of jesting at executions, is that so?—Yes.

961. Is that principally among the people who assemble early in the morning and wait till the time of the execution, or is it among the crowd at the time the execution is going on?—There is never any such language at the time the execution is going on, but they seem to be amused while waiting by any little incident which they can notice. If a man goes into the crowd with a hat upon his head, it is certain to be knocked off; they strike it and chevy it away from one to another a distance off, and the further it is sent the louder is the roar of applause which follows it.

962. That is what is called larking?—Yes.

963. (*Mr. Hunt.*) But it ceases when the criminal comes out?—Yes, there is silence immediately, and great anxiety to see all that can be seen.

964. (*Mr. Neate.*) There is stillness and silence?—Yes.

965. (*Mr. Waddington.*) Do many prostitutes attend?—Very few women attend, those are of the lowest class; they seem to be in company with costermongers, and they are almost invariably under the influence of drink, those not in the company of men are prostitutes of the lowest class. At the execution of Müller I saw a man's legs above the heads of the crowd for a period, I should say, of three or four minutes. The man was crying out very much, and there was a great uproar and hubbub, but his legs were exalted above the heads of the crowd, and his head was down.

966. How long was that before the execution?—About a quarter of an hour before the execution.

967. (*Mr. Neate.*) And the police are helpless to interfere?—Perfectly helpless in the city, but not at Horsemonger Lane.

968. In the case of heinous offenders, the worst class of offenders, do you not always take special precaution when you have them in custody?—Do you mean previous to their trial?

969. When you have them in custody as policemen?—A general arrangement is made. I cannot say that I have known any special arrangement, except in the case of the man named Marley. There were special circumstances in that case, and special arrangements to prevent his escape. For instance, three or four policemen attended the van which conveyed him from the House of Detention to the police court.

970. He was handcuffed, I suppose?—Yes.

971. When you have once got an offender in your custody, there is no real difficulty in protecting yourself from his violence, is there?—Not at all.

972. Then in what way would the removal of Capital Punishment affect the safety of the police? You said that the police had a general feeling that if a man was not liable to be hanged, it would be much more dangerous for them to do their duty?—It frequently happens that a policeman on duty during the still hours of the night, say at 3 or 4 o'clock in the morning, apprehends a burglar in the act of committing a burglary, and a constable of low stature perhaps will apprehend an immensely powerful burglar; whatever the influence may be on the mind of the burglar I do not know, but a constable 5 feet 7 or 8 inches high will apprehend and convey to the police station a burglar 6 feet high. The danger exists in the act of apprehension.

973. (*Mr. Waddington.*) When he is once handcuffed he is safe?—He is safe when he is once at the station; but it is rarely a policeman handcuffs a prisoner.

974. (*Mr. Hardy.*) But even in the case of some of those very violent men who are handcuffed, they have been known to knock the police down. Have you known of such occurrences ?—I have heard of it in the country, but the county police are rather different from the metropolitan. *Mr. T. Kittle.* 1 Dec. 1864.

975. (*Mr. Attorney-General for Ireland.*) Have you ever encountered one of those fighting men yourself ?—Never as a burglar, but I have taken fighting men into custody, and they have gone very quietly without any resistance.

976. (*Mr. Neate.*) But you have not taken one into custody for any heinous offence ?—Never for any heinous offence.

977. Your observation would only apply to those cases in which a man would commit an offence for which he would now be liable to a very great penalty ?—I have had prisoners many times in custody, and they have said, "If it was not for swinging for you, I would stick a "knife into you." I have heard a prisoner make the same remark after being committed by the magistrate, or that he would hang for me when he came out. I have afterwards met that prisoner when he came out, and he has acted in the mildest manner towards me.

978. Those things are often said without being meant ?—I believe that they are meant at the time, but that they are said in the heat of passion.

The witness withdrew.

Mr. Richard Tanner examined. *Mr. R. Tanner*

979. (*Chairman.*) What office do you hold ?—I am an Inspector of the Metropolitan detective police.

980. You have had a good deal of experience with criminals, I presume ?—Yes, for the last 14 years.

981. Can you give the Commission any information upon the subject of Capital Punishment, as to whether or not criminals generally speaking are intimidated by the expectation of Capital Punishment ?—I think that they are, a certain class especially ; I allude to old offenders.

982. And you think that they are deterred by the fear of Capital Punishment from committing offences ?—Yes, from committing murder.

983. Have you ever heard any of them express the opinion that they would commit murder if it was not for Capital Punishment ?—I have had cases myself where I have apprehended prisoners. I know many cases. I could mention two persons now who are sentenced to penal servitude for life, named Pusey and Reeves.

984. (*Mr. Waddington.*) For what offence ?—For robbery with violence in a dwelling-house. I had had one of them, namely, Pusey, in custody before, and he had been convicted six or seven times, and ultimately I apprehended him for stealing Lord Foley's plate, and with four others he got three years penal servitude ; they induced the steward's-room boy to steal the plate. Pusey came back from penal servitude ; he had a ticket-of-leave, and went back and associated with another ticket-of-leave man who was discharged with him, at their old haunts in Paddington. They entered the house of a very old lady in Paddington, and went to the top of the house, and there met the housemaid coming out of the room ; they stopped her and told her to be quiet, as they were going to rob the old lady's room. They went in and threw the old lady down on the floor, and rolled her over with her clothes over her head ; they did not very much hurt her, but sufficiently to deter her from making any noise. They took all her available

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money, and some jewels which there were in the bedroom, 40*l*., or something like that. In the meantime the housemaid screamed; they threw her down two or three stairs, and then ran out of the house. Sir Richard Mayne employed me to investigate the matter, and I suspected Pusey from the description; I looked for him, and I found him in company with Reeves, who was another ticket-of-leave man, and they were arrested. Pusey then did not disguise (in fact, he said so in the police court) that if it had not been for "choking" (that is the slang term used by thieves for being hanged), using an oath, she should not have been there to have told the tale—that was the housemaid, and the same with the old lady, who really was too ill to come to the police court; but we took him to the house, and she fairly identified him. Those cases I think can be multiplied by a very large number.

985. (*Mr. Hunt.*) You think that the fear of Capital Punishment saved the life of the housemaid upon that occasion?—Yes, and of the old lady too. This applies to all old offenders; men who have not any fear, I believe, of penal servitude. I am of opinion that there are hundreds or probably, I may say, a thousand persons in London, who have very little fear of penal servitude.

986. (*Mr. Waddington.*) It would have been to have escaped the penal servitude that Pusey would have committed this murder, if you believe what he said?—But he was almost as sure of penal servitude for life as he was of a month, because he had had seven convictions, and had previously had penal servitude for three years.

987. Then he must have dreaded penal servitude for life?—I think not much.

988. Then why should he have said that he would have committed the murder. What would have been his object in committing the murder, except to escape the detection and the conviction, and the sentence of penal servitude for life?—What I mean to convey is that he would have committed the murder if he had not had the fear of being hanged.

989. And what would have been his object in committing the murder?—If he had committed the murder he would have destroyed important evidence against him, and stood a good chance of acquittal.

990. And therefore he would not have been sentenced to penal servitude?—But he might have been convicted of murder and executed.

991. (*Mr. Attorney-General for Ireland.*) You did not mean to say that penal servitude for life is not an uncomfortable thing to anybody?—I believe that some men do not mind it much.

992. (*Mr. Waddington.*) Why should Pusey have dreaded being convicted if he was not afraid of penal servitude for life. Why should he have wished to suppress the evidence against him if he had not a fear of penal servitude for life?—He would have had a chance of escaping altogether.

993. Escaping penal servitude for life, which you say he does not dread?—I do not think he does.

994. Then why should he wish to escape?—They all wish to escape.

995. (*Mr. Attorney-General for Ireland.*) I suppose you mean that he does not dread it very much?—Certainly.

996. They all wish to be at liberty?—Yes, I mean that they do not dread it so much as many criminals.

997. A confirmed criminal does not wish to be shut up for 10 or 15 years?—They certainly do not care very much about it.

998. (*Mr. Neate.*) Supposing that the punishment for murder was perpetual penal servitude and that the punishment for burglary with violence, but without murder, was 15 years, do you think that a burglar

would take into consideration that difference, and that that would stay his hand, and that he would say, "I will not kill, because instead of 15 years I shall get it for life"?—I should think that it would stay his hand, but that refers to some class of offenders.

999. (*Mr. Ewart.*) The punishment might be rendered very much more severe than penal servitude for life, because there might be a previous confinement, and it might be made altogether much more severe?—For instance there are many men I think who have had penal servitude before, and if it was not for the fear of being hanged, they would very deliberately murder me if the punishment was only penal servitude, rather than be apprehended.

1000. (*Mr. Hunt.*) Do you think that that would be the case if the punishment was penal servitude for life?—Yes.

1001. You do not think that it would have a deterring effect?—Not at all. For instance if Pusey had murdered me he could only have had penal servitude for life, and he was nearly as certain as possible that he should have penal servitude for life, if he did not murder me.

1002. (*Mr. Attorney-General for Ireland.*) And he might as well have murdered you to get rid of the chance of being convicted?—Yes, there would have been a chance of escape.

1003. (*Mr. Hunt.*) Supposing that for the burglary he would only have had 15 years transportation, but that for murdering you he would have had transportation for life, do you think that that would have had a deterring effect upon him?—Yes, I should think so, because if he was a man who had been several times convicted, and had had penal servitude before, and was certain that he would only get 15 years, I should think that that would deter him if he was certain of his punishment, but there would of course be the danger of making a certain punishment of criminals whom we have in and out of gaol all their lifetime; they know the inside of the gaol, they would say "If we are cast we know what will be the worst of it, we know that we shall only get 15 years."

1004. Do you think that the criminal class know what the punishment is for every offence?—The old thieves know pretty well what is sure to follow to them again.

1005. You think that generally they know the maximum punishment?—Yes; the old thieves.

1006. (*Mr. Waddington.*) The men who have been in the convict prisons are of course perfectly aware of the remission which is applicable to each sentence?—Yes.

1007. It is put up in their cells?—Yes; and after previous convictions they know what the Judges say to their pals who have been convicted, "You have been here before, and we cannot let you out "upon society again, and your sentence is penal servitude for life," that is handed from one to another, and they get well acquainted with the system.

1008. (*Mr. Neate.*) Do you think that the sentence of penal servitude for life makes a sensible impression upon them?—Yes; but they have all now a hope of getting out of it.

1009. But if it was penal servitude for life without hope of remission, you think that they would look upon it as a very dreadful punishment?—I think so.

1010. Have you had any opportunity of seeing the criminal classes at large when they are not apprehended, or not in charge for any offence?—Yes; I am always engaged in it.

1011. Do you hear them discuss at all the subject of punishment?—Yes.

1012. Do they seem to attach any great importance to the difference

Mr. R. Tanner. between being hanged and being imprisoned for life?—Always a very great difference.

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1013. In their conversation when at large?—Yes; there is a very great dread of being hanged.

1014. I mean the conversation which goes on at the thieves' public houses, have you ever been to a thieves' public house?—Yes; many.

1015. Do they talk there about punishment at all?—Yes.

1016. And from their conversation, you would infer that they look upon hanging as much worse than imprisonment for life?—Yes; much worse.

1017. Can you mention the way in which they have expressed that feeling?—That they have always a dread (to use their term) of being "choked." It is conversation which has been heard from one offender to another, when they have been in the act, "Do not choke him," "Do "not murder him," "Do not do this," and "do not do that," from the very fear of being hanged.

1018. (*Mr. Waddington.*) Is it not a fact that these old thieves of whom you have been speaking, very seldom get hanged?—Very seldom.

1019. They almost always stop short?—Yes; I believe that Pusey would have deliberately thrown that housemaid from the top of the stairs to the bottom, and as deliberately have murdered me almost as soon as he would have eaten his dinner, but for the fear of being hanged.

1020. But being an old offender he stopped short?—Yes; from the fear of being, as he said, "choked."

1021. (*Chairman.*) Looking at the number of murders which are committed, are they committed by those old thieves?—No; in many cases they are not, they stop short of it.

1022. In a large number of cases, taking the country throughout, the murderers are not the old thieves?—No; I think that many murders are committed by mistake. There are many persons whom I would not hang.

1023. (*Mr. Waddington.*) You mean that they are committed by persons in a passion, who do not intend to kill?—I do not think that Müller intended to kill Mr. Briggs. I would not hang a man like Mr. Townley, I would not hang the man who murdered his sweetheart. I do not think that that was a cold-blooded murder. On the other hand, Palmer and those sort of persons intended, in cold blood, to murder their victims.

1024. (*Mr. Neate.*) Do you think that that is the general feeling of the poorer classes, or of those whom you see, namely, that they would not hang in those cases, or are you expressing your own opinion?—It is merely an individual opinion. In the case of Mullins, for the Stepney murder, it was a deliberate cold-blooded murder. When I apprehended Emms, the shoemaker, whom he accused, but who was an innocent man, he had a wife and children, and they were all crying round him; of course, it was a dreadful thing that their father should be charged with murder. I said to Mullins, as we walked along to the station, "Poor Emms seems very ill." He said, "Ah, he will be "worse to-morrow." That man was fairly gloating over what he had done—he little thought that in less than an hour I should charge him with the murder.

1025. (*Mr. Waddington.*) Mullins, having committed the murder himself, accused Emms for the purpose of the reward?—He had several ends. He had been a convict before; he had lost his pension of 35*l.* a year, and, if he could have convinced me that Emms committed the murder he would probably have been re-instated with his

pension and have got the reward, and have shaken the crime off his own shoulders. *Mr. R. Turner.* 1 Dec. 1864.

1026. Have you often attended at executions?—No; I have not any such morbid taste.

1027. (*Mr. Neate.*) When you state that criminals in the actual commission of an offence have sometimes said to each other, "Do not "choke him," "Do not kill him," do you mean that they have said that to prevent being hanged themselves?—Yes.

1028. Did they say, "Do not choke him, or else we shall be hanged"?—Yes, from the fear of being hanged.

1029. They might say it from a feeling of humanity?—It was not to carry the thing too far.

1030. (*Mr. Attorney-General for Ireland.*) I understood you at first to say that the criminal class of an advanced kind did not care about penal servitude for life?—I do not think that they do much. You must not understand me to mean that they do not care at all about it.

1031. After that you said in answer to Mr. Neate that you thought that penal servitude for life would be deterrent enough to prevent people committing murder?—No; not with old offenders.

1032. (*Mr. Waddington.*) I understood you to distinguish between penal servitude for life at present, where there is a hope of remission, and penal servitude where there is no remission at all, but where they are to be kept in prison rigidly to the end of their lives?—Yes; I do not think that they believe in it.

1033. (*Mr. Ewart.*) Do you think that these old offenders are increasing in number, or otherwise?—I think that we have not such a large number of what I call swell mob thieves as we had formerly, but I attribute that to the more efficient police in all the counties and in the metropolis.

1034. I suppose that crime is much more easily checked at present under the system of police throughout the country?—I think so.

The witness withdrew.

Adjourned to Thursday, 15th December, at 12 o'clock.

Thursday, 15th December, 1864.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT ESQ., M.P.
WILLIAM EWART ESQ., M.P.
GATHORNE HARDY ESQ., M.P.
GEORGE WARD HUNT ESQ., M.P.
CHARLES NEATE ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

Sir FITZROY KELLY, M.P., examined.

1035. (*Chairman.*) You have had considerable experience in the criminal law of this country?—I have, in the criminal law. I have had extensive practice in criminal courts; but I have given my attention throughout the whole of my professional life to the criminal law. *Sir F. Kelly, M.P.* 15 Dec. 1864.

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1036. You have filled the office of Attorney-General?—Of Attorney-General and Solicitor-General.

1037. And no doubt in the course of your experience you have had the subject of Capital Punishment brought frequently before you?—Yes; I have more than once myself introduced bills upon the subject in the House of Commons, some of which have passed into law.

1038. Will you give the Commission the opinion which you have formed generally on the subject of Capital Punishment?—I have for a long time been of opinion that Capital Punishment ought to cease, and time, and observation, and experience have only strengthened my opinions, I might venture to say my convictions, upon that subject.

1039. Can you state any reasons for the conviction at which you have arrived?—It is difficult, in answer to specific questions, to state the reasons which operate upon one's mind on so very large and so important a question; but I would observe that in the first place I object to Capital Punishment on the ground that it is from time to time the cause of innocent men being put to death. I object to it also upon this further ground: Assuming, as I conceive that I am at liberty to assume, that the great object of all punishment is to deter from the commission of crime, I have long been satisfied that in the present state of the law, and the administration of the law, the system of Capital Punishment has no substantial effect in deterring from the commission of crime; in other words, were Capital Punishment to be abolished by law, I do not conceive that any who are now deterred by the fear of Capital Punishment from committing murder would not equally be deterred from the commission of that crime by the fear of a secondary punishment, if a secondary punishment of the extreme degree of severity which could be carried into practical effect were imposed by law.

1040. Have you ever considered what that secondary punishment should be in the event of the abolition of Capital Punishment?—If transportation be any longer practicable, I should say transportation with every degree of severity throughout life, without relief, and without hope of change or mitigation.

1041. Do you think that it would be possible to carry out transportation in the manner which you have suggested?—I am not prepared to say that it is possible long to continue transportation at all under any circumstances for any time, however short; but whatever may be the mode of punishment, if it be transportation it should be life-long; if it be penal servitude, which is the only remaining punishment known to the law, it should endure for life, and it should be accompanied with every degree of hardship which could be inflicted short of cruelty, (which is, of course, out of the question,) such as hard labour, spare diet, and everything else which could tend to make life otherwise than welcome and almost unendurable.

1042. It has been suggested in the course of this inquiry that in the event of a secondary punishment such as you point at being carried out, there would be no possibility in the event of the prisoner so sentenced being guilty of the murder of any of those who were superintending him, of punishing him for that second offence; what have you to say upon that point?—I am speaking, not of the commission of every offence which is murder by law at present, but of the worst degree of murder, a deliberate murder, such as ought to be punished with the extreme of human punishment. That cannot be exceeded, and therefore, whether it be for one or for twenty murders, it is that and that alone which can be inflicted. I would inflict upon the deliberate murderer, where the murder has been committed with no circumstances

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of mitigation or extenuation, the very severest punishment that man could devise, and to endure for life, short of torture or cruelty. What that may be it is not for me to say at this moment; but if transportation be practicable, it should be transportation with hard labour besides, but above all it should be hopeless; it should endure for life under every variety and change of circumstances that could possibly exist; and I see no difficulty and no impracticability in it. One who has deliberately taken away the life of a fellow creature cannot complain of anything short of torture to which he can be subjected as a punishment; and I do not think that public opinion would ever interfere with such a punishment in cases of the worst descriptions of murder.

1043. You do not think that those of the prisoner's relatives who felt interested about him would be continually applying for some mitigation if, after ten, fifteen, or twenty years, he had conducted himself as well as a man under these circumstances could do?—It would be impossible to prevent applications, but I think that all such applications should be deliberately and systematically rejected. If a man be put to death, sent to another world with his sins unrepented and unatoned for, and without time for repentance and without the possibility of atonement, surely you would have an answer to any relatives or friends who might apply for mercy; and they could not complain of any degree of severity short of Capital Punishment.

1044. You have no doubt formed an opinion as to how offences of that description should be classed. You have spoken of the worst sort of murder; there is one class to which I will call your attention, namely, infanticide, as it is called?—I think that that question would only arise if Capital Punishment should be retained. If I am desired to say what, if Capital Punishment should be retained, should be the degrees of guilt in cases of murder to which Capital Punishment should then be confined, I am quite prepared to say all that upon a very hasty consideration occurs to my own mind upon the subject. I think (and of course an infinite variety of circumstances may occur) it must be left to the Judge and the jury to determine whether there exist, upon the whole, extenuating circumstances which ought to save life; and I am very much disposed to think that if Capital Punishment be retained there should be a power in the jury to find a verdict of guilty with extenuating circumstances, and that in all such cases life should be spared, and the next severest or an adequately severe secondary punishment should be imposed, unless the Judge disapprove, and disapprove upon reasons satisfactory to other authorities; and when I say "other "authorities," I beg to state with all respect that I do not mean the Secretary of State, or at least the Secretary of State alone, but other authorities to whom such questions, arising but rarely and but few in number, could easily be referred.

1045. Am I to understand you to mean that the jury, in stating that there were extenuating circumstances, should give their reasons, or merely state their opinion without giving reasons?—That the jury should merely find a verdict of guilty generally, which would mean that Capital Punishment, if it existed, was to be carried into effect, as far as their verdict was concerned; or should find a verdict of guilty, with extenuating circumstances, and no more. I think that it would be imposing a task full of danger, and full of difficulty, and full of inconvenience, and of mischievous consequences upon a jury to require them to say more than that merely, under all the circumstances of the particular case before them, they found that there were such facts proved in evidence before them as should in their

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judgment be followed by a remission of Capital Punishment, in other words, a verdict of guilty with extenuating circumstances. When I used the term "reasons," I was speaking of the Judge. I think that when the jury have found a verdict of guilty, with extenuating circumstances, life should be spared, unless the Judge, differing from the jury, should allege reasons (and to the allegations of reasons on the part of the Judge I see no objection whatever), which to other high advisers of the Crown, such as the Lord Chancellor and the two Chief Justices, and perhaps the Secretary of State and others, should appear satisfactory, and which should induce the Crown, nevertheless, to carry the verdict of "guilty" into effect.

1046. Would the extenuating circumstances apply to the crime of infanticide which has become somewhat frequent; how would you deal with that crime?—I would deal with infanticide upon separate and distinct grounds, and upon its own grounds alone. I think that infanticide should be divided into two classes;—infanticide where the child is illegitimate, and infanticide of another description which may be murder in its worst form. The murder of an infant may be as criminal in every respect, and under as aggravated circumstances, as the murder of a grown person. But to take what is usually denominated "infanticide," that is the murder by the mother or the other parent of an illegitimate child upon or shortly after its birth, I think that that should be treated as a separate offence, and, whatever may be the general opinion of this Commission in respect of Capital Punishment, should no longer be capitally punishable.

1047. (*Lord Stanley.*) Am I to understand you to put it in this way, that you would inflict a lighter punishment for the murder of a child, because it was an illegitimate child?—No, I do not say so, far from it. I mean that what passes generally under the name of "infanticide" is the murder by the mother or those connected with the mother of a child about the time of its birth, or immediately after its birth, and where the child is illegitimate. That is a class of crime now well known in criminal courts; it has acquired the name of "infanticide," (although that term is equally applicable to murder of another kind;) and it is that to which I allude, when I say that public opinion and the verdicts of juries for a long time have gone against the law, and rendered the law inoperative, so that we have no executions (we have never, of late years I believe, at least, had any executions) for that kind of infanticide. It would no doubt require a good deal of nicety in the framing of a bill to deal with that particular offence, but it is to that class of offences that I refer, namely, the murder in the lower classes by women of their illegitimate children, which unfortunately is of very frequent occurrence. Inasmuch as juries will not convict where there is a possibility of the sentence of death following, and inasmuch as I do not believe, that even if there be a conviction, it has been usual of late years to inflict the punishment of death, it is to that class of cases properly and nicely defined, that I refer when I say that I think they should be no longer capital.

1048. (*Chairman.*) You would confine it, as I understand you, to taking away the life of a child by the mother, and not by the father of an illegitimate offspring?—No, I do not say that; I think that it is generally by the mother, or the mother is a party, but whether anybody else is a party to it or not, I do not think that the offence itself should be any longer capital, even if Capital Punishment be retained.

1049. I understood you to state within a certain time?—Yes.

1050. You draw no distinction between the guilt of the mother and the guilt of the father?—I think that the guilt of the father is greater

than that of the mother, but in legislation it would be very difficult to draw a distinction, nor indeed would it be necessary, because the moment you render a crime otherwise than capital, you then leave it to the Judge or the tribunal which has to deal with the offence to impose upon the father and upon the mother respectively an adequate degree of punishment, and no more. All I say is, that I think that infanticide, or what usually passes under the name of infanticide at the present day, should no longer be capital; then when it is no longer capital, the Judge may pronounce a sentence of transportation for life, or penal servitude for life, or for 20 years, or 15 years, or down even to a short imprisonment, with or without hard labour.

1051. (*Mr. Waddington.*) Then is what you propose, if Capital Punishment were abolished, not that the Judge should necessarily pass a sentence of penal servitude for life, but that he should have the discretion which he now has?—Are you speaking of infanticide?

1052. No; of all murders?—I am speaking only of infanticide.

1053. (*Lord Stanley.*) Would not your object be sufficiently attained, under the circumstances which you mention, by giving to the jury the power of finding extenuating circumstances, which, in the case of infanticide committed in the manner to which you refer, they would undoubtedly always do?—That, practically speaking, is a very complex question. I should be quite content to leave infanticide capitally punishable, and with the power to the jury to find extenuating circumstances, if there were no power beyond which could revise that sentence, and could still lead to the infliction of Capital Punishment. But it will be remembered that when I ventured to express an opinion, that if Capital Punishment be retained, a jury should have the power to pronounce a verdict of guilty, with extenuating circumstances, I suggested the reserving of a power to the Judge still, in effect, to set aside that part of the verdict, and to inflict Capital Punishment, if, with the approval of a higher tribunal, constituted in some such way as I have loosely thrown out, he saw good cause for that degree of severity. So long as Capital Punishment could, under any possible circumstances, be inflicted, I would not leave it to a jury to deal with infanticide, for I think that they would be likely to acquit altogether, if they could not find manslaughter; and thus the guilty would escape rather than the slightest hazard should be incurred of the putting to death of a woman, or even of the putative father of a child, for infanticide.

1054. (*Chairman.*) I understood you, in giving reasons why you thought that Capital Punishment ought to be abolished, to give two reasons, one that the punishment ought to deter, which you state it does not, and the other that innocent men are put to death. Have you any cases in your mind in which you think it is shown that innocent men have suffered within the last, say, 10 or 20 years?—The Commission are well aware that a very important and a very difficult question of fact here arises. That question is this: is it true, or is it not true, that from time to time occasionally (it may be but rarely, yet in relation to such a subject many would say often, and too often) innocent men are in fact condemned and put to death? I myself, having long considered and well considered the subject and the evidence which has arisen in various cases, have come to the conclusion that it is not in any way reasonably to be doubted that in many instances (of course I cannot pretend to say how many) innocent men have been capitally convicted, and in certain numbers of instances, fewer of course but yet formidable numbers, have been actually executed.

1055. Would you put any limit of time within which you are

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speaking?—I was about to mention a limit of time, though, again, it it is very difficult to do so practically, and with that degree of certainty with which one would desire to speak upon such a subject. If the Commission desire it, I will state all that has occurred to me upon that subject, and what I know, or have reason to believe from information which I have received from others. I was going to observe that, before we arrive at the mere question of fact, Have innocent men been convicted and actually put to death under this system of Capital Punishment? we may perhaps be permitted to ask ourselves is there any reason, *à priori*, why errors should not be committed upon the trial of capital cases before a Judge and a jury, just as well, as naturally, and as probably as in civil cases? We know that in civil cases it occurs continually; and the cases are not merely numerous, but when we take a considerable space of time, absolutely innumerable, in which errors are committed by juries in the verdicts which they pronounce upon questions of fact which have been brought before them. And not to go at length into what would not, perhaps, concern the Commission at the present moment, and is not within the object of their being here assembled, namely, into criminal cases in general, but confining myself to capital cases, I have often asked myself, and I now presume to ask this Commission, what reason can be assigned by any man living why, in capital cases, that is, literally speaking, now in cases of murder, there should not be the same liability to error and the same probability of error as exists in a variety of other cases, civil cases, in which we know that errors without number are committed. I have heard it said, and with surprise, that criminal cases (including therein capital cases) are generally as to the facts of a simple and unequivocal character. On the contrary, speaking from my experience, I apprehend that cases of murder are often as complicated in relation to the facts which are brought before a jury, and involve questions of as great a degree of difficulty, scientific questions, and questions of identity, for example, and open to as much doubt, as questions of any description which can arise in any sort of judicial proceeding. We have seen within our own times a great number of cases of murder where scientific men of the highest eminence have appeared in numbers on the one side and on the other, and have differed upon matters of fact on which the verdict of "Guilty" or of "Not Guilty" has depended. We have seen, again (I have done so within my own experience, and it must be familiar to all who hear me, who have watched the course of human action in human life), that these cases of murder sometimes bring together so complicated a state of facts before a jury that the greatest possible difficulty exists in even stating them with a sufficient degree of lucidity and perspicuity to make them intelligible to an ordinary jury. It is impossible to exaggerate the difficulty and the complication which sometimes arise in the facts which are given in evidence upon a trial for murder. And, again (which is one of the great sources of the most terrible and fatal errors), questions of identity of person, also, arise very frequently in cases of murder. Why, then, considering that such is the character of the trial, and of the evidence which is brought forward, should we say *à priori* that error is improbable, and that it rarely occurs that there is a false verdict, when we find that in trials of a like nature or of a more simple nature, and more likely to be free from error and free from doubt and difficulty, errors nevertheless do arise. I know that against this we have to set the very great care and caution the vastly superior degree of care and caution with which a trial for life and death is conducted, and the tendency which exists in the minds of the jury, and in the mind of

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the Judge, to take a lenient and favourable, or what is called a merciful view, of every question which raises a doubt. I take all these matters into consideration, and I set them against the probability, from the nature of these inquiries, and of the evidence adduced at such trials, that errors may arise ; but with all that, and taking that fairly into consideration, my experience, and what has come to my knowledge from time to time in relation to these trials, and to the verdicts which have been pronounced, lead me to the conclusion that, though by reason of the set-off (if I may use that familiar expression) to which I have already adverted, I do not say error is so probable in criminal as in civil cases, yet I feel perfectly convinced that, in spite of all this care and caution, error often may arise, and often does arise, and is often fatal to truth and to justice in the result. I have been often asked with regard to the fact itself, whether cases have come within my knowledge of innocent men being capitally convicted. Now, no doubt this is a question of great difficulty. I have heard it over and over again asserted in the House of Commons by men high in authority that they are perfectly satisfied, and they have even gone so far as to say that all who have reflected upon this subject are satisfied, that it very rarely happens that an innocent man is capitally convicted. The degree of rarity is rather an ambiguous expression, but I will not stop to consider that. If it really be the truth that within the last 50 years as many as 20 or 30 individuals, subjects of this kingdom, have been unduly convicted, being innocent, and have been condemned to death, and that any portion of that number, but particularly what one might term a substantial portion of that number, have actually suffered death, I own that it appears to me that, unless murder cannot be otherwise avoided than by the application of Capital Punishment, and unless we can speak from experience, and say that by no degree of secondary punishment is it possible to avoid the multiplied murders which are or may be committed or supposed to be committed, it is no longer the right of a legislature or of the Government of a country thus to inflict death upon innocent men. Now let me state what little has come to my knowledge upon the subject. In the first place, I may say that there are three or four cases with which I have myself been familiar, and about which no sort of doubt can exist; and if they are but fair specimens of other cases with which I am not acquainted, except from the reports of others, and from what may perhaps be open to doubt as to the accuracy of the information which I have obtained, the conclusion is manifest. But before I refer to any particular case, I would beg the leave of the Commission to allude to a passage which I have found in a work which I dare say has come before all the members of the Commission, namely, a work of the late Mr. Charles Phillips ; I think it is called "Vacation Thoughts on Capital Punishment." Mr. Phillips, I observe, in that work gives instances of various cases, beginning I think with the year 1660, and bringing them down to our own times, in which under circumstances which had been given in evidence certain individuals have been capitally convicted who have turned out to have been perfectly innocent. Upon those cases, and upon some others which he has mentioned, all I can say is, that I think that if it be in the power of this Commission or in the power of the Government of the country by any means to institute a distinct and specific inquiry into all the cases which appear to have arisen, it will be well worth while to do so, not going so far back as Mr. Phillips, because the law, and the state of public feeling, and the administration of justice, were all different from what they are now, or we trust will ever be again ; but going back only to the beginning of the present century, a period which many now living can remember, and so ascertaining the par-

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ticulars of all the cases which are in any way to be found on record in which there is reason to suppose that innocent people have been capitally convicted and sentenced to death, whether they have suffered death or not, I think that it would be an act well worthy of the Crown or of the Government of the country, and would result in bringing before this Commission, or any similar Commission or Committee, very important information which I think would of itself be sufficient to guide them to a just decision upon the matter on which they have to report to the Crown. Having ventured to make that observation, let me now go on to what Mr. Phillips observes in relation to myself. He has quoted a sentence from, I believe, the ordinary Parliamentary Reports in which I appear to have said that 17 cases had been found of capital convictions of persons who had afterwards turned out to be innocent, and that of those 17 I think 7 had actually suffered death. I believe that there is an inaccuracy there, and that the number which I stated was not 17 but was 22. Unhappily two gentlemen who assisted me at that time, not only in researches which I made, but in all my efforts to procure first the abolition of Capital Punishment, and afterwards a Court of Criminal Appeal, by successive Bills which year after year I brought into the House of Commons, are now no more; namely, the late Mr. Sidney Taylor, whom all acquainted with this subject must well remember, and the late Mr. Gunning, both of the Norfolk Circuit. It was to those gentlemen that I was indebted for that information, and they certainly furnished me at that time with 22 cases which they had investigated and which more or less I looked into myself. Unhappily, trusting to them, I did not retain the notes, and though I am now making inquiries from those who represent them, I have been unable to obtain the notes of those cases. I can, therefore, only speak from recollection, but I well remember that there were altogether between the years 1802–03, when I think the first case occurred, and the year 1840 when this report was made to me, at the time when I moved to bring in a bill in the House of Commons, 22 cases of capital convictions, 7 of which resulted in the execution of the convicts, and in the rest of which the sentence was mitigated or upon the innocence of the parties appearing in sufficient time they were pardoned; but in the whole of the 22 cases the innocence of these persons was established, or at least established satisfactorily to those who investigated the matter, and in most of the cases to the satisfaction of the advisers of the Crown; and the general result was I believe such as to leave no reasonable doubt of the innocence of all these parties. I am aware that it is always open to those who take a different view of this subject, and who may perhaps dissent from the conclusion arrived at in any particular case, to say that the evidence of innocence may be fallacious on the one side, as the evidence of guilt is said to have been fallacious on the other. Upon that I can only observe, that the conclusion at which I and all who considered the subject arrived, with regard to these 22 cases, was that no reasonable, no serious doubt could exist in the mind of anybody, that in all these cases, that is to say, in 22 instances, innocent people had been condemned and capitally convicted; and I should say that this was only a part of the entire number of cases which these gentlemen were then investigating, and many more of which they thought would be attended with a similar result. I lament greatly that I did not preserve the notes. I returned them I think to Mr. Sidney Taylor or Mr. Gunning. It may be that I shall be able to obtain them before this Commission shall cease to sit; if I should obtain them I will take care to forward them with your permission to the Commission. In the

mean time I can only say that such was the result, and a part only of the result, of the investigations of these gentleman during the first 40, or I may say 38, years of the present century terminating in 1840. Besides those 22 cases there were two or three very recent cases communicated to myself. One I alluded to in the House of Commons, and, therefore, will not say more about now, which had been recently tried, the case of a person of the name of Chalker, who had been capitally convicted for the murder of a gamekeeper; he was executed, and it turned out a few years afterwards that the real murderer had appeared in India, and when dying had confessed his guilt.

1056. (*Mr. Hunt.*) What was the date of that case?—I think that it must have been about the year 1835 or 1836.

1057. (*Mr. Bright.*) It was at Ipswich?—Yes. I alluded to it, and the reference will, I think, be found in the Parliamentary Reports, when I moved for a Criminal Appeal Bill in the year 1844, when Sir James Graham was Secretary of State. In that case applications had been made to the Home Secretary, but in vain, for a reconsideration of the sentence, and it turned out, as I have mentioned, that the real murderer had fled and gone to India, where he afterwards, before he died, confessed his guilt.

1058. (*Mr. Neate.*) Was the man who was executed wholly free from guilt?—Yes; he was the wrong man.

1059. He was not one of the parties at all?—He was not. But a case which I was going to mention, and which is altogether within my own recollection (the name is not present to my memory at this moment, but I can give it hereafter), is a case with which I was supplied by the late Mr Prendergast, a gentleman on my own circuit, who had great experience in criminal courts. It is the case of a person who was tried, convicted, and sentenced to death, and would have been executed, I think, on a Monday morning, but on the Sunday he was respited and his life saved, and he was very shortly afterwards pardoned under these circumstances. Three men with others were drinking in a public-house at night; two of them, the murdered man and the man who was indicted for his murder and convicted, quarrelled, and the murdered man threw a pint pot at the head of the other, who started up and swore that he would be the death of him; the murdered man ran out of the house and ran away pursued by the other and followed (though it was not noticed at the time) by a third; he ran from the public-house in question a considerable distance through sheds and buildings towards a dock or quay, and the second man, the pursuer, was seen by several persons at different points lying between the one place and the other. The murdered man was heard by some man who could not see what was going on, but was very near the spot, behind a shed, suddenly to fall down; blows were heard, and cries and struggles; shortly afterwards an appeal for mercy, and other blows and loud words were heard; and a minute after this the man afterwards convicted was seen running away in great agitation a few yards only from the spot in which the murdered man was shortly afterwards found; and when seized he was found with his hands and the front of his clothes almost covered with blood. The murdered man was found a few minutes afterwards on the spot to which there could be no doubt, upon this evidence, the second man, the man who was afterwards tried, had followed him. He was found stabbed in three places, and quite dead. These were the circumstances. The man protested his innocence, but upon his trial before Lord Chief Justice Tindal was convicted and sentenced to death. He had borne a most excellent character. He told his own story, which I will tell in a few

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moments, but he was disbelieved. An application was made by the Home Office to Lord Chief Justice Tindal. The answer was from that most humane and mild and merciful of judges, that he saw no reason at all to doubt the propriety of the sentence and the man was accordingly left for execution. The third man, who had followed the other man out of the public house, was just after this murder apprehended for a highway robbery with violence, tried in an adjoining county, and sentenced to death, and just before the time of his execution he had understood what had taken place with respect to this other man, and he confessed that he was the murderer, and that he had followed the man out. He knew, which the man who was tried and convicted for the murder did not know, that the murdered man had a considerable sum of money in his pocket, and he had really gone into the public house with the intent to pick a quarrel with him, and if he could, afterwards to get the money. He followed the man. He saw the second man, as I have called him, go up and overtake the murdered man, who fell on his knees and begged for mercy. The second man gave him a kick and thrust him down, and that was all that he did, and he walked away. As soon as he had gone away, the third man went up, caught the man by the throat and stabbed him in three places, and robbed him of his money. While he was doing this, the man cried out for mercy and uttered those cries which were heard and given in evidence against the man who was tried and convicted. This brought back the man, who had fled to some little distance. He heard this poor wretch crying in the way I have stated, and he came back again. The third man had in the meantime stabbed the murdered man and taken the money out of his pocket, and fled in a totally different direction. The second man came up and rendered the murdered man all the assistance that he could, and in so doing got himself covered with blood. He could not save the man, and then occurred to him the danger to which he was exposing himself, and in great agitation, finding that he could not save the man, he ran away, and was caught in the way I have stated. The real murderer proved the matter not only by stating the case under circumstances which left no room for doubt, but he pointed out where a knife or some implement which he had had (I forget what it was) would be found buried, and he also pointed out where a portion of the money of which he had robbed the murdered man could be found, and it was found there; and of course the innocent man was pardoned. I mention this case (and it is only one of some four or five cases, which I need not go into, but which have come before me, which I have heard of, and which perhaps all of us may have read of) to show how strong a case of circumstantial evidence may be made out, and what infinite and irresistible probabilities may be made to arise, and yet the person charged with the offence may be innocent. I therefore say that if a case like this happens only once in half a century, but still more if we find that such cases do occur from time to time, and again that there are cases of mistaken identity, and that there are other cases in which, with all the acuteness of attention and the anxious care and caution which can be bestowed upon the subject, error cannot be avoided, and innocent men are in fact convicted, it appears to me to constitute a ground why, unless murders can be prevented in no other way, and unless no other description of punishment will have any effect at all, it is the duty of the Legislature to put an end to Capital Punishment.

1060. (*Chairman.*) I understood you to give it as your opinion that Capital Punishment has not a deterring effect?—No, I put it upon another ground. In the first place, I do not think that the inquiry into

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that question has ever been made in the right direction. We are not dealing with people in the class of life of those who are assembled in this room, nor even with the middle classes, nor with any educated or intelligent classes, nor people with whom human motives will operate in an ordinary way; but we are dealing with a class of people of whom personally we all know very little, and if we desire to ascertain the probable effect of one punishment or another being inflicted by law for this or that particular offence, we must consider the character and the habits, and the nature in general, of those classes of persons among whom such crimes are committed. It is there that it appears to me all inquiries which have ever been made have altogether fallen short of the proper field of investigation; and, as far as I see in any of the Reports of the Committees or Commissions, or the evidence which has been taken before them, with which I happen at this moment to be acquainted or to remember, I can only recollect the case of Alderman Harmer, who was a solicitor, as is familiarly known to you all, with the most extensive practice in criminal cases of any man that lived or lives, and in habits of personal intercourse and communication with all the very worst classes of society, men of every grade and description of guilt and wickedness. Now, Alderman Harmer, who therefore knew more than any one else of the classes with which we are dealing, namely, those classes of persons as to whom the question arises whether they are deterred by the fear of death from committing crimes, from which they would not be deterred by the fear of the next severest punishment which it is in the power of the Legislature to inflict, was clearly of opinion that it was not so. Alderman Harmer strenuously urged the opinion, sometimes before a Committee, and sometimes, as was well known to those who knew him, in private conversation, that a man who is disposed to commit a murder, and who will not be deterred by the fear of whatever punishment the law may inflict in the way of transportation and penal servitude, (I do not know that he used the expression "penal servitude," but the next severest degree of punishment which the law can inflict) will not be deterred at all, but will commit the offence. Of course it must to a certain extent be matter of conjecture; but I may observe upon this point that all who have ever written or thought deeply upon the subject, as far as I know, from Beccaria to Romilly, and from him I may go to Harmer and others who have considered the subject, have been of opinion that it is rather the certainty than the severity of punishment which really does deter from the commission of crime, and they have all thought that, from the kind of uncertainty which now exists, such as the multiplied chances of escape from the mercy or the error of juries, from applications afterwards to the Secretary of State, from conflicts upon the evidence, in cases of poison for example, between scientific men, and from the other sources of accident and deviation from the strict and right course of justice, which are inevitable in the present state of the law, there is more encouragement to hope for impunity than any discouragement to the commission of crime which can exist by reason of the fear of death; whereas we know that if we once take away Capital Punishment we remove in a moment all these sources of uncertainty; no jury will then ever hesitate, in a fair and good case of evidence, to convict because they dread the putting to death of an innocent man. The Judge, again, will sum up in a different way, and convictions will take place, because it will be known that they are not irrevocable; and if anything should turn up, and if there should be a doubt suggested by the ingenuity of counsel, or if there should be anything which has fallen from a witness

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which might lead to further inquiry, or if there should be a doubt which might make it the duty of the Judge almost to direct an acquittal at once as the law now stands, there will still be no harm in a conviction. Of course one would desire that no error should be committed of any description, but if Capital Punishment is abolished then, upon subsequent inquiry, any error can always be set right if it turns out to the satisfaction of the Secretary of State that the evidence has been mistaken. I ought to say, in reference to a subject which I have done with, and upon which I have no more to add, namely, the numbers of innocent persons who have been capitally convicted, that if I myself entertained any doubt of the correctness of the report which I received from those gentlemen to whom I have alluded, and which I hope yet to be able to lay before the Commission, that doubt would be removed by the evidence (which I daresay is already before the Commission) given by Mr. Sheriff Wilde in relation to some occurrences which took place during his shrievalty in the year 1828. My statement is of 22 cases in the course of 40 years. Mr. Wilde gives the names and the particulars of the cases of five persons who in one year were capitally convicted and sentenced to death, and would have been actually executed but for his interposition, it having been through his efforts made to appear to Sir Robert Peel, who was then Secretary of State, that they were innocent men. I think that his evidence will be found in the Second Report of the Commissioners on the Criminal Law, which was made, I believe, in 1836.

1061. (*Mr. Waddington.*) It is referred to in Mr. Phillips' book in 1833?—I would very earnestly direct the attention of the Commission to that evidence of Mr. Sheriff Wilde. I believe that he is still living; he was a brother of the late Lord Truro. But looking to his statement, if I might have doubted at first, as I did doubt at first, that it was possible that even in 40 years as many as 22, which with the additions that I have mentioned would make 25 or 26 innocent men, had been capitally convicted and sentenced to death, yet if we have the names and particulars of the cases, and the Secretary of State to whom they were referred, and if the sheriff of one place alone (though, to be sure, that place is London), can point out five instances in one single year, his year of office, of innocent men capitally convicted and sentenced to death, and actually about to suffer death, what reason have we to doubt that during the 27 years which preceded that period there were as many in every one, or, at least, if not in every one, in most of those years.

1062. (*Mr. Bright.*) Do you recollect whether those five cases were cases of murder, or of lesser crimes for which the punishment of death was inflicted?—One case, I think, was highway robbery with violence.

1063. (*Mr. Waddington.*) None of them were cases of murder?—No, I believe not. I will make one observation, while I have in my recollection Mr. Sheriff Wilde's evidence; and it is this, which I venture to think is well worthy the attention of the Commission. He also, as showing the extreme probability that many innocent men are sacrificed, points out the great difficulty, if not impossibility, which exists in people of that class making their cases known, in the helpless condition to which they are reduced after conviction, unless through the interposition in their favour of some charitable sheriff, or chaplain, or other officer who may be about them. He mentions two or three instances of one person and another, being, I do not know how many days, finding out in what form to send a paper or a petition to the Secretary of State. And when we remember the difficulty to which a solicitor with ample means, and with intelligence and experience, is

sometimes reduced in collecting evidence for an ordinary civil trial in any of our courts of justice, and remember the situation of these poor people who may have to get together half a dozen witnesses in different parts of the kingdom, or even of the town, in order to make out even a plausible case before the Secretary of State, they being without money and without friends, and themselves imprisoned and unable to stir a step, I cannot help believing, as Sheriff Wilde believed, and as I think he induced Sir Robert Peel to believe that there must be a great number of cases in which innocent people have been convicted, and have been utterly unable to bring their cases under the attention of the Secretary of State.

1064. (*Chairman.*) With reference to that part of your observations, do you believe that in these days any persons tried for murder are unable to make a defence in consequence of the difficulties which were stated by Sheriff Wilde?—No, not a defence; if I have used that expression, I beg to retract it.

1065. I believe that it was my expression?—I do not believe that in this country anybody will ever be at a loss to make a defence at the trial. The case which I was putting was that of poor, and helpless, and friendless people after conviction, in gaol, under sentence of death. I believe that many such persons have actually suffered death because they have been unable to make these efforts, and to put people in motion to collect evidence, and properly to submit the case to the Secretary of State.

1066. (*Mr. Hunt.*) Did not the shrievalty of Sheriff Wilde occur before the Prisoners' Counsel Act was passed?—Yes.

1067. The cases which he mentions would probably never occur in the present state of the law?—I do not at all know that.

1068. (*Mr. Waddington.*) In what year was he sheriff?—In 1828.

1069. (*Mr. Bright.*) You have spoken with regard to cases which happened a good many years ago, you recollect a case probably which happened in the neighbourhood of Dublin where a person of the name of Kirwan was convicted of killing his wife?—Perfectly.

1670. He was not executed?—No; it was since.

1671. Do you recollect the great exertions which were made by his friends, of whom he had many, on his behalf?—Yes.

1672. Do you know the grounds on which he was not executed?—I do not remember them at this moment. I have a work in which the whole of that case is reported at length, and which I can send to you, if it be of any use to you.

1073. We will come to the case of Dr. Smethurst, who was convicted of poisoning only three or four years ago, when I think Sir George Lewis was Home Secretary; he was convicted, and he was not executed, but was pardoned?—Yes.

1074. If Mr. Kirwan and Dr. Smethurst had been two poor men in any part of the country, without earnest and active friends to intercede for them, what is your opinion as to the probability of their having been executed?—I have no doubt that they would have been executed, unless they had met with some beneficent man like Sheriff Wilde, or somebody who would come to save them. Had they been poor men, and friendless, and moneyless, I think that they would have suffered death.

1075. With reference to cases of poisoning, has it occurred to you that in those cases there is especial danger of the conviction, and even the execution, of innocent persons?—I think that there is the greatest possible danger. There was a most remarkable proof of it in the case of a man who was undoubtedly guilty, but who was convicted and

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sentenced to death, and afterwards executed, upon evidence which turned out to be totally erroneous. I refer to the case of Tawell. He was convicted and sentenced to death upon the evidence of certain medical men, a number of chemists and others, as to a certain way in which they declared that they had no doubt that the woman had taken a certain poison. He, only a little while before his death, told the whole truth to Lord Nugent and some other magistrates of Buckinghamshire. Though he freely admitted that he had poisoned the woman, he told them, and proved to them, that it was in a totally different way ; so that the evidence of these people, the whole system of evidence upon which the man was convicted, was absolutely incorrect from beginning to end. I may say that the same danger exists in matters of law as exists in matters of fact, and which may be illustrated by a case in which (it is now more than 20 years ago) I myself was engaged as counsel. A man was capitally indicted for murder, the murder being not what we usually understand by the term murder, but that he had given certain drugs to a woman to procure abortion, of which she died. He was tried and convicted by the late Mr. Baron Vaughan. I made an objection in point of law upon the evidence, and it was very elaborately argued by counsel upon both sides. It was over-ruled by the Judge, and notwithstanding my very earnest entreaties to him to reserve it, he refused to reserve the point, and the man being convicted he left him for execution. I again, after the trial, applied to him in writing, and personally, beseeching to take counsel with some other Judge, and to consider whether at all events the man's life should not be spared. I urged that it was not one of the worst cases of murder, though to give a medicine to procure abortion is no doubt a very improper act. However it was all in vain ; he absolutely refused to reserve the point which I was satisfied was a good point, and I at last had no other mode of attempting to save the man's life than by leaving my circuit, and coming up to town and stating the case to Lord Lyndhurst, who was then Chancellor. He stated it to the Lord Chief Justice of the Court of Queen's Bench, and between them they thought that there was quite enough in the matter to make it arguable ; and Lord Lyndhurst wrote to Mr. Baron Vaughan to suggest to him the propriety of reserving the point. Of course he did so, but that letter reached him only six hours before the man would have been executed. The point was reserved. I argued it myself against a very eminent counsel before the 12 Judges (there was then no Court of Criminal Appeal upon reserved points as there is now) and the 12 Judges (11 of them at least, I believe it was 11 who were there) including Mr. Baron Vaughan himself, were unanimously of opinion that the point was good, and the man's life was spared—the sentence was commuted to transportation. With these dangers, even with the ablest Judges in point of law, and with similar dangers, and perhaps greater dangers upon points of fact with juries and with Judges, the conclusion at which I have arrived (and it is really all, unless in answer to specific questions, that I should venture to submit further to this Commission) is, that while you can punish and deter by the next severest punishment which man can inflict, short of the punishment of death, you ought not to inflict an irrevocable punishment unless there be an infallible tribunal.

1076. Has it occurred to you that in the exercise of the law with regard to Capital Punishment, great injustice is done by administering one punishment for offences which are very different. For example, with regard to robbery, you can give a variety of imprisonments, with hard labour or without hard labour, twenty different sentences can be

passed, but with regard to murder there is but one sentence, and that irrevocable; is the crime of murder always the same crime?—No, I think that murder may be committed with a great many different degrees of guilt, particularly as the law stands now, and it stands, I think, in great need of amendment. I refer to the law of constructive murder which still prevails. For example, I may allude to the very case which I have just mentioned. I do not say that it is not a very wicked act to give a woman medicine to procure abortion, but it is certainly very different from a deliberate and savage murder, but the punishment is the same. That is why I have already remarked that I think there ought to be a power in the jury, if you are to retain Capital Punishment, to pronounce a verdict of guilty with extenuating circumstances, so as not to leave it entirely to the discretion of the Judge, or of that very worst of all existing human tribunals, the Secretary of State, to determine the degree of punishment. I think that there ought to be a means of inflicting by law and according to law the gradations of punishment according to the degree of guilt.

1077. Have you not known in your experience that the last punishment of hanging in this country has been inflicted upon two criminals convicted of murder whose guilt was as different as the guilt of petty larceny from the worst description of highway robbery?—Yes, I think that there must have been such cases.

1078. If there be a punishment of this kind, which can be inflicted only once, and which admits of no change but which is irrevocable, is it not absolutely necessary that there must exist the injustice of a great inequality of punishment?—I think so.

1079. You recollect that at the beginning of this year a man was executed in London of the name of Wright, who had killed a woman who had been living with him as his wife some time during the night; it was supposed to be during a quarrel; the case caused great excitement?—Yes; he pleaded guilty, I think.

1080. He pleaded guilty. You recollect the case of the man Tawell, or of the man Palmer, of Rugeley?—Yes.

1081. Or of Mr. and Mrs. Manning, or others?—Yes.

1082. Can you conceive a greater injustice and mal-administration of what we call perfect law, than that the same punishment, and an irrevocable and the highest punishment, should be inflicted in all those cases?—I think that it is very objectionable. I was very much shocked when I read of that case of Wright, particularly coming as it did at the same time as another case which we all remember, namely, that of Townley, where the man escaped; but even if Wright's case had come together with those which you have mentioned, of Palmer and the Mannings, to inflict the same punishment upon those three individuals, Palmer, Manning, and Wright, appears to me to be something which shocks one's understanding.

1083. From what you know of the administration of the criminal law, with regard to the highest offences in other Christian and civilized countries, do you believe that offences of that kind committed under such circumstances, namely, sudden provocation with apparently no premeditation, are punished with death in any other country than this?—I think not. Even in France, where the administration of justice is in a state which we trust will never prevail here, the power in the jury to find a verdict of guilty with extenuating circumstances prevents that degree of injustice of which you are speaking, and I do not think that in any country in the world, certainly not in any with the institutions of which I am acquainted, such an inequality of justice or of injustice could possibly have existed.

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1084. (*Mr. Waddington.*) You are well acquainted I know with the French law, are you not aware that such a case as that of Wright would not have been a capital offence by the French law?—It would not.

1085. It is the law in point of fact which is to a certain extent in fault in this country?—It is so.

1086. I am speaking independently of the finding of extenuating circumstances, but of the law itself?—It is so undoubtedly, but it comes back to the same point as relates to the business of this Commission, namely, that if you had no Capital Punishment you would not have this inequality.

1087. (*Mr Bright.*) Within your experience have you not found public opinion constantly driving, with more or less of varying force, at the abolition of Capital Punishment for different offences. You recollect, I presume, when men were hanged for a dozen or 100 offences which are not capital?—Perfectly; within my recollection 140 and more capital offences have been rendered no longer capital by law.

1088. Public opinion was constantly at war with the law with regard to those cases?—Constantly.

1089. With regard to infanticide, with reference to which you have been asked some questions, is not public opinion at war with the law with regard to that offence?—Yes.

1090. And in point of fact the law has submitted, and is obsolete?—Yes; I believe that there is no such thing as a capital conviction, or if there be, a capital sentence executed for infanticide.

1091. With regard to cases of murder, is it within your knowledge that, although juries still convict, yet there are individuals who greatly object to serve on juries of such a nature, and that there are cases in which the jury search for any possible excuse on which the prisoner can be acquitted?—Yes; I think so. Of course the state of things is much changed now since the time when juries would not convict for forgery, and when they found, contrary to their oaths, that property worth 10*l.* and 20*l.* was worth 39*s.* in order to save life, and avoid a capital conviction, but even now in cases of murder, and with their feelings still more strongly excited, there are juries, or rather I should say there are individual jurymen, but whose opposition is fatal to a verdict of guilty, who will not find a man guilty.

1092. One of the Judges has stated before this Commission, in I think a written letter, that in one case he was asked by a jury whether they could not reduce the case to manslaughter, and he said, "No if it "is anything it is murder;" and they after further discussion acquitted the man. Supposing that an alteration of the law was made, such as I think Mr. Waddington has partly suggested, and that you had two degrees of murder, or more—because it might be quite as reasonable to have three or four as two, with the growing feeling of the people against Capital Punishment, do not you think that there would be a considerable inclination to put a person into the list No. 2, which would give him a secondary punishment, instead of putting him into the class of murder in the first degree. Do not you suppose that as long as the punishment exists at all there will be cases in which the sympathy of the jury, and their abhorrence of shedding more blood, and their feeling of doubt which men cannot very easily get rid of in such cases, will put them in opposition to the intended action of the law?—I think that it would be so even if verdicts with extenuating circumstances could be pronounced. I do not think, however, that the time will ever come when, for murder committed under very aggravated circumstances, there will be any indisposition in juries in general to convict even

where Capital Punishment is to be inflicted ; but there may still and at last be some cases in which individuals among a jury will at all times rather, if they can, compel a verdict of a secondary character.

1093. If it is open to a jury to bring in a verdict of guilty in the second degree, which shall save the life of the prisoner, still exposing him to the next worse punishment, are you of opinion that that power, will often be used by the jury, and perhaps in cases where the law does not intend it ?—I think that it would be so to some extent, but only in few and exceptional cases ; still there would be a general disposition in juries to take a lenient view of every case before them.

1094. And that danger will necessarily increase, will it not, as the reverence for human life increases ?—It will, but I should be very sorry to speculate upon the possible consequences of a change of that nature. I should hope, though I desire to see Capital Punishment altogether abolished, that if it be retained at all, it will still be inflicted in circumstances of an aggravated character, and where the case is free from doubt.

1095. Only in those cases ?—Only in those cases.

1096. Therefore, supposing for the moment that the time has not come for abolishing Capital Punishment altogether, you think that the time has come for so changing the law that many cases which are now capitally dealt with in this country should no longer be so ?—I think so.

1097. (*Mr. Waddington.*) That has been done in America, I think, in several states ?—Yes.

1098. In all the principal states, such as New York, Pennsylvania, and Massachusetts, and I think in the New England States ?—Yes.

1099. Are you informed by any American lawyer whether it has had a good effect, and has worked well or not ?—I have heard from very high authority that it has worked well, and that crime, in the belief of my informants, has diminished, certainly has not increased.

1100. (*Mr. Bright.*) Has it ever occurred to you that a very considerable proportion of men who appear in the courts as murderers have never appeared in the courts before, but have led apparently inoffensive lives within the law ; that the majority of them, or many of them, are not of what is called the criminal class ?—I cannot say that I ever made that remark ; but, as I have already said, I am not very familiar with criminal courts. It has been generally in some particular cases, and on special occasions, that I have gone into a criminal court at all.

1101. (*Lord Stanley.*) If I have understood your argument correctly, a considerable part of your objection to the present administration of the law would be removed by an alteration which we have not the power of considering here, namely, the establishment of a court of criminal appeal ?—I do not say that my objection to Capital Punishment would be removed except to this extent ; I think that if there were an efficient court of criminal appeal, the cases in which innocent men are convicted and punished would be greatly diminished. To that extent, and to that extent only, I should say that a court of criminal appeal would diminish the objection to Capital Punishment.

1102. If it were conceded that Capital Punishment ought only to be inflicted in cases of aggravated and deliberate murder, where no extenuating circumstance existed, do you conceive that that object would be best accomplished by an attempt at classifying offences more minutely than is done at present, or by giving a jury the power of diminishing the punishment by returning a verdict of extenuating circumstances ?—I think that there should be both. Of the two, I had rather give the jury the power to find extenuating circumstances.

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1103. Would not that, in effect, give so large a discretion to men who, as experience shows, will always lean to the side of mercy, as in a great degree to remove the necessity for a fresh classification of offences?—I think that it might very considerably diminish the necessity for a classification, because the jury would, in all but the worst cases, find some extenuating circumstances, and then those being once found, and life saved, there is really little occasion for classification, because the Judge may diminish the punishment. He has a discretion as to the punishment, in every variety of degree.

1104. With regard to the class of cases in which verdicts of acquittal are returned, contrary to the evidence, from the scruples of one or two of the jury against inflicting Capital Punishment, would not those cases be completely met by giving to the jury the power of excluding the punishment of death in the particular case?—Yes, in a great measure; but not, I think, altogether.

1105. With regard to your proposal of a substitution, in some form, of perpetual imprisonment or perpetual penal servitude, have you considered the difficulty of carrying that into effect, in consequence of the probable failure of health after a certain term of confinement?—Yes, I have considered that particular difficulty, and many others. It is one of the most difficult subjects that can arise, and, after all, our judgments may well fail us where we have so little experience. As to anything like a certain life punishment, we know nothing about it from experience; but the consideration of health is a great difficulty at once.

1106. We will put it in this way—might it not very well happen that a man of ordinary health, after some years' close confinement, and as you have expressly stated, with no hope before him of relaxation, would break down under it, and would not the case then arise—here is a life which can be saved by a relaxation of punishment, but which will inevitably be sacrificed if punishment is continued, and in that case would not you be morally compelled by every principle upon which you act in the revision of Capital Punishment, to remove the severer part of the punishment?—Yes; I do not, however, consider that an insuperable objection, but I quite admit that it is a very great difficulty, and it assumes a form which it is hard to deal with, when we consider that if you remove a man into a hospital or some other receptacle for invalids, you really give him a better and a pleasanter life than many a man has who has never committed any crime at all, and is obliged to live in poverty, and that too although the man may have been guilty of the most aggravated of murders. I have thought of all that, and I do not say that it does not make one pause before one comes to any conclusion upon so very important a subject. Still I think that, viewing everything together, it is better that such a man should escape the punishment which he so well deserves, than that even one of a hundred, if guiltless, should suffer death.

1107. (*Mr. Waddington.*) He might be let out conditionally, and if he recovered his health he might be returned to prison?—Yes.

1108. Would not the same difficulty arise in a case of threatened insanity, if it were certified by medical men that the confinement would almost certainly produce insanity?—No doubt.

1109. (*Lord Stanley.*) You have spoken of the objections (and no doubt we all feel them) to an irrevocable punishment, but in a certain sense if a man's innocence is only established at a considerable distance of time after his sentence, is not the punishment which he is undergoing irrevocable—is it not a question of degree?—It is so, but generally speaking the innocence of a man would be manifested within a little while, within a few months or a year, and therefore it would be

an extreme case to suppose that it would only come at a great distance of time ; it might be so, but even then it is better than that he should be put to death.

1110. (*Mr. Ewart.*) Would you not rather apply to the punishment of death the term "irremediable" than "irrevocable" ?—It is both irremediable and irrevocable.

1111. (*Mr. Waddington.*) With regard to giving the jury the power of finding extenuating circumstances, has not that power been very much abused in France by the juries ?—Yes.

1112. And is it upon that ground that you propose to limit it, by providing that their verdict should be subject to review by the Judge ? —It is chiefly upon that ground ; and now and then there are popular feelings prevailing which might really lead to a departure from justice ; and I think that there should be some controlling power which would be very rarely exercised by a Judge, subject, as I say, to approval by a higher tribunal.

1113. Am I correct in understanding that the state of the law which you would propose would be this, that where the jury found no extenuating circumstances there should be a rigid and inexorable sentence for life, in which the Judge should have no discretion ; but that where the jury found extenuating circumstances the Judge should have a discretion to pass a very heavy sentence, or a milder sentence ?—No, pardon me. I have only spoken of conferring the power upon the jury to find extenuating circumstances on the assumption that Capital Punishment is continued.

1114. Then am I to understand that, assuming that Capital Punishment were abolished, and that the imprisonment which you have spoken of were substituted, you would apply that to all cases ?—I am not prepared to say that if Capital Punishment were abolished altogether I should feel at all disposed to introduce the system of verdicts of extenuating circumstances, but merely classify the offences.

1115. Then supposing that Capital Punishment were abolished, you would approve of an alteration in the law, so as to classify the offences? —Yes, and indeed that I think absolutely necessary. We have now constructive murders—if a man is committing any offence which is really of a trivial nature, so that it is something which would constitute an illegal act, and in so doing causes death, it amounts to murder.

1116. A man may now commit a murder without the intention of killing the person or even of doing him any serious injury ?—Yes.

1117. (*Mr. Neate.*) Is it not true that a large proportion of the Judges have never given, previously to their appointment as Judges, any attention whatever to the study of the criminal law ?—I cannot say that.

1118. I do not speak with reference to the existing Judges, but has it not been so in your professional experience ?—I think that all the Judges who are, or in my time ever have been, Judges of the superior courts, have given their attention to the criminal law, and I should suppose have very attentively studied it, but there are a great many of them who have had no sort of practice in criminal courts.

1119. A considerable number of them have never held a brief in a criminal court ?—A great many.

1120. Can you conceive it possible that a man may have been appointed a Judge who has never in his life been in a criminal court of justice ?—I think so. When I say that he has never in his life been in a criminal court it is using too strong an expression ; indeed I may say, as to myself, that if it had not occurred that I had occasionally a special retainer to defend somebody who happened to be a little better

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off in the world than most of those whose lives are put in jeopardy, and also that from having come early into Parliament I had given my attention, as a member of Parliament, to these subjects, I should have been in that category myself. I never went to any Court of Quarter Sessions. I never went as a matter of practice into any criminal court in my life, and though I had studied the criminal law like every other branch of the law before I began to practice as a barrister, I happened to have the good fortune very soon to get into what is called good civil business at the bar, and I had nothing in the world to do with criminal law, or criminal books, or criminal justice.

1121. The ordinary course of a lawyer's education does not comprise any study whatever of criminal law, does it?—I cannot say that. I think that if the person who instructs him, namely, the barrister, or whatever he may be, under whom he studies, does his duty, he will take care that he is well instructed in criminal law as in anything else.

1122. As a matter of fact does not a man begin with a conveyancer?—Not always.

1123. But usually?—No, I should say not. A man who is brought up to the common law bar generally studies a year, or two years, with a special pleader or a barrister.

1124. In a special pleader's chambers it is a very unusual thing to have criminal law brought under notice, is it not?—Yes, there is very little indeed, but I must add that those under whom I studied gave me precedents of indictments to work at, at a very early period of my studies, and in order to understand the practice, I had to read chapter after chapter of the criminal law, and I fancied that when I went to the bar I knew as much of the criminal law as of anything else. There is a defect, which I think at times must be very embarrassing to Judges, namely, that the greater number of barristers have no practice in the criminal courts. A man may be 20, 25, or 30 years at the bar before he is made a Judge, and during the whole of that time may only once or twice have occasion to go into a criminal court, or to consult a criminal book.

1125. Looking especially to that class of Judges who, being practising as special pleaders, and who after practising for some years as special pleaders are called to the bar, they go at once to the civil side, the *nisi prius* side, do they not?—Yes.

1126. And may not many such men have risen to the highest eminence in their profession without having given the slightest thought or attention to any subject connected with the criminal law?—I think that it may be so with some during their career, and there may be, for aught I know, some inattention to the criminal law, in some barristers' or special pleaders' chambers; but in general I should say, that a man to do his duty would teach criminal law as well as every other branch of the law. But there is a very numerous portion of the profession, and from whom here and there Judges are selected, and above all the highest Judge in the land, the Lord Chancellor, who never, at least systematically, study the criminal law, and very many of whom are altogether unfamiliar with it, even in the slightest degree, that is the equity men, the men who practise in the Court of Chancery.

1127. Do you think as a fact that the Judges, after they are made Judges, have much time to devote to the principles of the criminal law?—No, I should think not. I think that the Judges are far too hard worked, and that they have no time at all.

1128. Do you think that the Judges, before they are made Judges, have bestowed much attention upon the course of legislation which has

been going on in this country ?—No. I must say, and I say it with unfeigned respect for the Judges, that I think they are, as a body, by no means eminently distinguished for their skill in legislation.

1129. Should you conceive it possible that a Judge might for, say, 10 or 12 years after forgery had ceased to be a capital offence, have bestowed so little attention upon the course of legislation as to believe that forgery still continued to be a capital offence ?—I should be sorry to say that. I should think that that hypothesis would not apply to any of the Judges at present upon the Bench. From all that I know of the habits of life and of the acquirements of the Judges who are now on the Bench, I do not think that there is any one of them but is as perfectly competent to administer the criminal law as to sit upon any ordinary trial at *nisi prius*.

1130. (*Mr. Ewart.*) Is it not an observation of Burke that lawyers are generally the worst law performers ?—You are speaking of legislation.

1131. (*Mr. Neate.*) Do you think that the Judges have studied the proportion between punishment and crime ?—They have certainly opportunities which few and perhaps no other men possess of studying the proportion between punishment and crime from the moment they become Judges ; before then they have no more than any other member of society.

1132. (*Mr. Ewart.*) Do you not think that it is a desirable thing for English lawyers to be well versed in the enlarged principles of criminal jurisprudence ; are they not confined to matters of practice ? —I think that as far as that is an evil it is in a course of remedy at present from the enlarged system of education now prevailing in our Inns of Court. I should hardly think that in our own time there is any danger of a want of knowledge of the largest principles of jurisprudence.

1133. (*Mr. Neate.*) Is there now a course of lectures on the criminal law at Lincoln's Inn ?—I do not know at this moment.

1134. (*Mr. Hunt.*) You stated at the commencement of your evidence that you thought that the punishment of death had not a greater deterrent force upon criminals than the most severe of secondary punishments ?—I did.

1135. Upon what do you base that opinion ?—In the first place, I rest it to some extent upon the evidence of Mr. Harmer and of a few other persons who have had intercourse with individuals of that class, which I myself have not had, and experience which very few people in any other rank of life than their own can possess. But besides that, I think that, looking to human nature in general, any man about to commit a crime would be as likely to be encouraged by the existing uncertainty of his conviction, as to be deterred by the dread of Capital Punishment. But I doubt whether murderers are in general much open to influences, one way or the other.

1136. You would think that a person who had superintended the management of a convict settlement was a good authority upon that question ?—It depends upon what kind of intercourse he might have had with convicts, and how far he would have been in a situation to be likely to learn the truth from them. I do not think that one who has the superintendence and the custody of convicts is the likeliest man to get at the truth in his communications with them. I think that it is more likely to be obtained by people who have communication with them while they are abroad and at liberty in the world, and while they are open to temptation, and are pursuing their ordinary course of life, men as I say like Alderman Harmer, the solicitor, who every day of

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his life had personal and unrestrained and confidential communication with all descriptions of criminals and wrong doers, under circumstances in which he was pretty sure to get at the truth. These are the men, and not the keepers or superintendents of convicts, to whom the convicts may be under temptation, or may have motives for telling anything but the truth, who are the best authorities as to how their minds are constituted, and what temptations and influences they would be likely to yield to.

1137. I will read to you a portion of the evidence which we have had on a former day. "I may mention that I have frequently heard, in "different situations in which I have been, the remark with violent "oaths, and with the fist raised and under various circumstances, 'If it "'was not for swinging, I would kill you,' 'I would stick you,' and all "that sort of thing. 'I would murder you, if it was not for swinging "'for you.'" Those expressions on the part of the criminal class would rather lead to a contrary inference, would they not, namely, that Capital Punishment is the most deterrent of punishments?—They would if they really meant precisely what was said, and if the man who said so had in his idea a comparison of the two punishments, and the probabilities of the one and of the other.

1138. I will read to you another piece of evidence which we have had as to what has been the actual effect. This is the evidence of Colonel Henderson: "In Western Australia the crime of rape, the crime of "assault with intent to commit murder, whether death ensued or not, "and the crime of burglary with violence, being armed, were all pun-"ishable with death. At the outset we found that there was a very "strong tendency on the part of the convicts to assault their officers. "There were several very bad cases, and it was determined by the "Governor in Council to put the law in force in the next case. A "very bad case occurred; a warder was cut down with a spade by a "convict; he did his best to kill him, and it was a miracle that he did "not kill him; that man was hanged, and from that time that crime "may almost be said to have ceased." That is, with regard to assaults upon prison officers. "It was the same with rape; the convicts were "dispersed all over the country, and the women, and especially the "children, were very much at their mercy, and there was a good deal "of rape. It was determined to put the law in force with respect to "that crime, and we almost succeeded in stopping it." The experience of that gentleman in Western Australia raises a directly contrary influence to that which you have laid down, does it not?—First, as to rape, all I can say is, that in this country the abolition of Capital Punishment in cases of rape has not increased the offence; but with regard to the attempts to murder, I would ask, how can it be said, unless you suppose that people who attempt to murder do not intend to murder, that there is any difference in the operation upon a man's mind of the fear of the punishment of death between murder itself and an attempt to murder?

1139. I put the following question to Colonel Henderson:—"What "punishment had you inflicted before in the case of rape?" His answer was: "There was nothing but penal servitude over again." So that before that, when they only gave an additional dose of penal servitude the crime was very prevalent; but upon their hanging for it the crime nearly ceased. Does not that show that the punishment of death has a greater deterring effect than any other punishment?—It might with people who are already in penal servitude, but that is a state of society which does not exist here. I do not say that for the criminal classes of this country who are already in penal servitude, or

have been in penal servitude, a different law might not be necessary, and might not have a very different effect from what it would have upon the classes of the people in general who are at present, many of them, untainted with crime at all, and know no more of penal servitude than they know of death.

1140. Then you think that on the worst class of persons the punishment of death may have a greater deterring effect than any other punishment ?—No. I speak of persons who have already been exposed to penal servitude, and have known, therefore, the worst that it can inflict. I think that to such persons the fear of death may have terrors which no other punishment will have ; but I do not think that the same reasoning is applicable to the class of the people in general who violate the law in this country.

1141. With regard to secondary punishment, have you at all considered what aggravation of imprisonment you could inflict in the case of murder, supposing you abolish Capital Punishment ?—No, I have not. I know of nothing but perpetual servitude, and hard labour and spare diet ; and if that continued for life, or as long as health lasts, I do not know, without cruelty, which would be intolerable, how its severity can be increased.

1142. Supposing that you abolished Capital Punishment, and that a man committed a murder, and was sentenced to perpetual imprisonment, and then he murdered his warder, what further would you do to him ? —You could do no more.

1143. Do you think that when you could do no more to a man there would be any security for the life of the person who looked after him ? —I should look to different means of security.

1144. What means would you look to ?—I should create safeguards for those who had the custody of these people.

1145. I want to know in detail what safeguards you would create, because that seems to me to be the great difficulty ?—In the first place I would never give a man who had committed a murder any weapon at all ; I would give him hard labour without the means of doing any other mischief than with the arms which nature gave him, and I would have him to labour under such circumstances that those who were about him, particularly if he had shown any mischievous tendencies, would be, if not armed, protected by those who were. I know of no means by which you can operate morally upon the minds of such people at all.

1146. You would not put a man in a cage or chain him ?—I am not prepared to say that I would not, so that it should not relieve him from hard labour, though I would not keep him perpetually chained. Of course this is a subject to which I have not applied my attention, and I know so little of the actual lives of the convicts, that I cannot form an opinion about it ; but I should think that those who understand this subject and have attended to it, could devise modes short of actual cruelty by which a man could be put to as much hard labour as his constitution and strength enabled him to go through, and could also be put under a degree of actual bodily restraint which would prevent his doing injury to anybody about him.

1147. Do you propose to put a murderer in irons for the rest of his life ?—I should hardly say absolutely for the rest of his life. If there were any danger of his doing mischief to anybody about him I should not mind keeping him in irons whenever he had anybody near him whom he could hurt.

The witness withdrew.

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The Rev. JOHN DAVIS, M.A., examined.

1148. (*Chairman.*) You are the Ordinary of Newgate?—Yes.

1149. How long have you held that position?—Not quite 22 years.

1150. During that time you have no doubt attended many prisoners under sentence of death?—A great many; 24 have been executed at Newgate since I have been there. I have with me a list of all who have been under sentence of death at the Central Criminal Court from the year 1840, that is 25 years, it includes the year 1840, that goes back before my time. There are 75 cases; this list includes all capital convictions under the jurisdiction of the Central Criminal Court, which is more than London.

1151. (*Mr. Bright.*) Are all persons who are convicted at the Central Criminal Court executed at Newgate?—No, there have been non but the five pirates executed since I have been at Newgate who have belonged to any other county except London and Middlesex. We have had 24 executed in London and Middlesex; that is, in 21 years.

1152. (*Mr. Hardy.*) They send them to the counties from which they came?—Yes. Of the number 24, eight have been executed during the present year.

1153. (*Mr. Bright.*) You say that there have been 75 convictions at the Central Criminal Court; do you know how many of those persons have been executed?—I cannot exactly say, because when we send them away we do not know what becomes of them; but I have heard that many of them have been executed.

1154. (*Chairman.*) What opinion have you formed on the subject of Capital Punishment in the 21 years that you have been the Ordinary of Newgate?—I am sure that it is quite impossible to avoid capital executions.

1155. What has led you to that opinion?—There is a class of criminals whom we call "incorrigibles," who will commit any crime but those which reflect back upon themselves. I do not think that you could by any possibility restrain that class of men but by the punishment of death.

1156. I understand you to say that there are criminals in Newgate who come under your notice from time to time, for other crimes, burglary, housebreaking, and various crimes, who are only restrained from committing murder by feeling that they will be hung if convicted?—Yes; I am sure that that is the case. It does not matter whether it is in Newgate or anywhere else. The same class of men are everywhere.

1157. (*Mr. Bright.*) I do not quite understand you; what is it that you mean?—There is a class of men among the criminals whom no rewards will encourage and no punishment will amend. We call them "incorrigible," for the want of a better word.

1158. Do you think that if it be clear that no other punishment will deter them, it is necessary to keep up Capital Punishment, with the view of deterring them from committing offences?—They would commit murders from motives which would not act on other people. They are very revengeful if they are ill treated in a slight degree. If you had persons under sentence of penal servitude for life, and you had no punishment of death, it would be dangerous to the warders to watch them.

1159. Have you been in any convict settlement, or have you had any experience of that kind?—No.

1160. In the case of the German who was last executed, are you aware whether he had ever before been under punishment for any criminal offence?—I think not.

1161. With regard to the man Wright who was hanged at Newgate last year, you are not aware probably that he had ever before broken the law ?—No ; he was executed at Horsemonger Lane ; he was sent to Surrey.

1162. Going over your experience of 20 years, you must remember, I presume, a great many cases of men who have been convicted and executed who had not before conducted themselves so as to place themselves in the criminal class ?—That is the case with all murderers generally ; murder is their first offence, generally speaking ; they are *sui generis*.

1163. That is your opinion ?—Yes.

1164. (*Mr. Waddington.*) The old offenders, I understand you to say, are deterred by the punishment of death ?—Yes.

1165. And by that alone ?—Yes, by that alone.

1166. (*Mr. Ewart.*) What proportion do these old offenders bear to the general class of prisoners ?—We very rarely get an old offender as a murderer.

1167. Then the "incorrigibles," as you call them, are not a very extensive class ?—No.

1168. Do you suppose that such a class of "incorrigibles" as you describe will always exist ?—Yes.

1169. Do not you think that the warders might be protected by some means of additional guards ?—I think that it would be most dangerous to the men who would have to watch over criminals under penal servitude for life if the punishment of death for murder were abolished.

1170. I ask that question particularly, as I understand you to say that the number of these "incorrigibles" is very small in proportion to the vast number of prisoners ?—Yes. But then you have found their character out ; and the warders, generally speaking, are not men of a high class of intelligence to deal with difficult characters.

1171. (*Mr. Bright.*) Is that your main reason for thinking that Capital Punishment is necessary, namely, to prevent the injury, and perhaps the murder, of the warders in the prison ?—That is one reason. It is not the only reason. The Scriptures are quite decisive upon the point.

1172. You heard the questions put by Mr. Hunt to Sir Fitzroy Kelly upon that subject ?—Yes.

1173. And you agree with him that that is an important matter ?—I thought that he had not an answer to make. You cannot keep men of that class in perpetual imprisonment, unless you have some fear for them. I think that I once saw in a Government Report, that a man had been 29 times tried for murder in Australia, and sentenced to imprisonment, and then imprisonment in chains ; and the next sentence was that his chains were to be taken off. It all showed that there is but one punishment which is effectual against murder.

1174. You said just now that you thought that the Scriptural argument was an argument of weight ?—I think so.

1175. In your profession as a clergyman, do you think it of more weight than any other of the arguments which are generally used on the question ?—The Scriptures are commands to us, and therefore we must obey them ; and they give the command "Whoso sheddeth man's "blood, by man shall his blood be shed."

1176. Therefore, apart from all other considerations, you would accept that as a command ?—I should.

1177. Do you think that the remissions of Capital Punishment, which now take place so often, the mercy of the Crown being extended, as it has been in a great many of these 75 cases which you have men-

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tioned, are injudiciously granted, and are contrary to Scripture?—No. I think that that prerogative has been very well exercised; and I wish that in one or two cases it had been extended further.

1178. Then you do not take the Old Testament expressions in a literal sense?—The Old Testament gives us reasons why we are not to take life. It is quite in conformity with Scripture that those sentences are not carried out. There is nothing in the Scripture at all contrary to it.

1179. Do you incline to the Scriptural argument, or to the argument of expediency?—Experience is the great thing. I am quite satisfied that if you abolished the punishment of death you would renew it in a year or two.

1180. Then if it were found not to be expedient, that is to say, if Capital Punishment were abolished, and the crime of murder did not increase, you would give up the Old Testament argument?—No, I should not give up the Old Testament argument.

1181. But surely you would not go back to Capital Punishment, if the crime of murder did not increase after the abolition of Capital Punishment?—We shall not see that state of things.

1182. (*Mr. Waddington.*) You have, I suppose, frequently conversed with prisoners under sentence of death?—Daily.

1183. Prisoners who have been convicted of murder?—Yes.

1184. Have you ever ascertained from those conversations whether at the time, or shortly before committing the act, they had considered the nature of the punishment which would follow?—I never knew a man under sentence of death who resisted the justice of the punishment.

1185. That is not my question. Have they ever told you whether, when they were considering whether they should commit the murder or not, the probability of being hanged produced an effect upon their minds?—I do not think that they care about it. They make up their minds to run the risk, and let the consequences be what they will, they will take them.

1186. Does it appear to you generally that they were in such an excited and desperate state of mind that the fear of punishment would not deter them?—Not at all. I do not think that it has anything to do with them.

1187. In those cases at any rate?—Yes.

1188. (*Lord Stanley.*) As far as your observation goes, do you think that there is any prisoner who has come under your charge who would not accept as a boon the commutation of the punishment of death to any secondary punishment, however severe?—He would accept anything. There is nothing to be compared with the sentence of death as to its effect upon the mind of the criminal.

1189. (*Mr. Bright.*) You think that it has no effect at the time of the commission of the crime, but that as it draws nearer, and appears to be certain, it has a great effect?—Yes; certainly.

1190. (*Mr. Hunt.*) You said that it was necessary to keep up the punishment of death on account of old offenders, and that there was hardly ever a case of an old offender committing a murder; what do you mean by that?—I do not think that you can manage such offenders without it.

1191. Why not?—We have had cases of men committing murder, and the men have been brought to Newgate and executed, where they have taken up things which one would never imagine. I think that there was one man in Millbank Prison who actually took up a water-closet or something like it and knocked a man's brains out with it.

1192. Do you think that professional thieves are restrained from committing murder from a fear of the punishment ?—I think so.

1193. (*Mr. Hardy.*) Has it ever come to your knowledge, in talking to people who have been guilty of burglaries or crimes like robbery with violence, that they were kept from going to the extreme limit of taking human life by the fear of death ?—Yes, I think so, in a great degree.

1194. You think that they have been stopped in their violence by the fear of death, if they went too far ?—Yes ; and also the known difference which there is in the sentence; if a man commits any of those crimes with personal violence the Judges always treat him much more harshly ; a very different sentence is given.

1195. (*Mr. Ewart.*) Was not the same argument used when Capital Punishment was abolished in other places ?—I do not know.

1196. Has it proved so ? Have persons been encouraged by the abolition of Capital Punishment, for instance, for horse stealing and cattle stealing ? It was said that they were deterred by Capital Punishment, but it has been abolished ?—I cannot answer that question.

1197. (*Mr. Hunt.*) Can you call to mind individual cases where men have admitted that they have been restrained from committing murder by the fear of the punishment ?—I remember a man of the name of Horler who was executed for murdering his wife. Under pretence of embracing her he took a razor and divided one side of her neck. He all along thought that he should escape, and he told me just before he died that if he had known that he would be executed for it he would not have murdered her.

1198. Why did he think that he should escape ?—He thought that he should escape under the plea of insanity, or something of that sort. He was a barber, I think.

1199. (*Mr. Ewart.*) You have said that you could find no means of sufficiently confining or coercing these bad characters in prison if Capital Punishment were abolished. Capital Punishment has been abolished in a great number of countries. Cannot we find the same means of restraining these bad characters as they have found in foreign countries ?—I cannot speak about that. I do not know anything about it.

1200. (*Mr. Bright.*) Has it not been stated that several murders have been committed by men whom we call ticket-of-leave men ?—I do not remember that.

1201. You may recollect a most horrible case in Hampshire, both of rape and murder, and there have been other cases of ticket-of-leave men committing murder. Have not those come under your notice ?—I do not recollect ever having a ticket-of-leave man in Newgate.

1202. But in those cases, if there be such, the old offenders are not terrified by the threat of Capital Punishment ?—Of course you cannot lay down any rule which will apply to all sorts of men.

1203. (*Mr. Neate.*) Speaking of criminals who are not capital criminals, speaking, for instance, of a highway robber or a burglar, is it from conversation with them after conviction that you have gathered the idea that they have been restrained ?—Yes, and from observation.

1204. Observation in what way ?—Noticing their behaviour, or their remarks upon certain matters.

1205. What sort of remarks ?—Whatever they might make. One can gather more from a prisoner by an incidental observation which he makes than in any other way. You seldom get much from them unless

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you happen to get into their confidence, which is a rare thing. Thieves only get into their confidence.

1206. You do not have them long after conviction?—No, only about 16 days on an average.

1207. You do not think it necessary to give them much attention during that short time?—We cannot do it. We clear the prison out 12 times in the year; every prisoner is released. It only gives us about 16 days as the average length of time that we have prisoners in the prison, so that we have not much time to look into their real character, as you would have when you had men for months or years.

1208. You said that the prisoners took great notice of the difference of punishment when they added violence to robbery?—Yes.

1209. Do you think that they would notice that difference, whether it was the difference between Capital Punishment and imprisonment, or whether it was between a long and a short term of imprisonment?—Yes.

1210. You think that they would notice the difference of punishment, although it should only be the difference between a short term and a long term of imprisonment?—Yes.

1211. And you think that it is not necessary, in order to establish that difference, to have Capital Punishment?—The old thieves dread long sentences.

1212. And when they are committing a robbery they remember that?—Yes.

1213. (*Mr. Waddington.*) I suppose that penal servitude for life, if they felt sure that it would not be mitigated, and that they would have to pass the whole of their lives in it, would be a very severe sentence?—They feel sure that it will be mitigated.

1214. Supposing that from experience they found out that in extreme cases it never was mitigated, do you not think that then they would dread it very much?—Yes, they would.

1215. Almost as much, perhaps, as death?—No, there is nothing like death.

1216. (*Mr. Neate.*) Your observations are taken from the time when they are under the pressure of it?—Yes.

1217. But you have said that at the time when they commit the offence you believe that it does not occupy them at all?—I believe that they rush into the crime. Murders are committed in a mad passion.

1218. You have no opportunity of knowing what is their state of mind when they are committing the crime?—No, of course not.

1219. (*Mr. Hunt.*) Are you in the habit, when an execution is approaching, of discoursing with other criminals in Newgate on the subject?—Not on the same day.

1220. But when a prisoner in Newgate is under sentence of death, do you make it the subject of conversation with other prisoners in the gaol?—No, not much; very seldom. I do not think that that is a good subject to talk about to them.

1221. Nor the subject of Capital Punishment?—No, they know all these things as well as we do. They are shrewd, intelligent fellows, but of debased principles.

1222. (*Chairman.*) With regard to executions being carried on in public or in private, what is your opinion?—I think that you would avoid a great many very serious evils if they were carried on in private. I should like to see the experiment tried. I was talking a few days ago with an American Judge, and he said that they had tried it in America, and that the effect was most beneficial; and I see that the

grand jury at Manchester have sent up a memorial to the Secretary of State upon the subject.

1223. (*Mr. Bright.*) They have had no experience of public executions in Manchester ?—No.

1224. (*Chairman.*) What would be your objection to an execution as carried on now in public ?—I am not at all confident that that is not the best, but I should very much like the other to be tried to see what the effect would be. There are many evils in the assembly of a large multitude, and there are always crimes committed under the very scaffold, which is a thing greatly to be avoided, if it possibly can be avoided; and I think that it would be avoided by executing persons in private. Besides that, if you look at Hogarth's prints, you have an execution about a century ago, and you see that the culprit is taken from Newgate up to Tyburn, driven under the gallows, and there executed. How very great an improvement it was to bring him just to the outside of the gaol and execute him there. Intolerable scenes must have occurred all the way that they went on their road to Tyburn. Then you may go a step further, and perhaps do as much good as was done by bringing him to the outside of the gaol instead of carrying him up to Tyburn. The taking of a man's life is a great act, and it needs to be done as publicly as possible, so that there is no needless cruelty.

1225. But the proposal of those who advocate that an execution should take place in private, is that it should take place before a certain number of persons, and that the representatives of the press should be admitted, and that everything should be made as public as possible to the community afterwards, so that they might be assured that such an execution had taken place, and that there had been no cruelties attending it, but that those things would be removed which are now thought to be objections, namely, the crowd and crimes as you state taking place under the very scaffold ?—It is well worth the experiment to try it in private; if it was tried once or twice, whether it was tried in London or in any other place, you would then know the result. But it will be very painful for the gentlemen who are called upon to witness it. At present a new sheriff occasionally almost faints. I know that I was ill for three days after witnessing the first execution which I attended.

1226. (*Mr. Waddington.*) It does not produce a very serious effect upon the mob ?—No; it is unpleasant.

1227. (*Mr. Bright.*) Do you feel any particular illness now ?—No, not now.

1228. Your familiarity with it, like familiarity with other things, makes a great difference ?—Yes; it makes all this difference.

1229. (*Mr. Neate.*) Do you think, from your experience of the officials who have to co-operate in this act, not merely the sheriff, that there is any increased feeling of reluctance to take part in it ?—No one who is compelled to attend likes it.

1230. Do you think that there is any increased reluctance ?—No, I think that it is about the same as it was; it is a very painful duty. In the case of the execution of the pirates, where we had seven under sentence of death, and five were executed, the number took away the horrible nature of the thing—it was not so shocking as the execution of one man.

1231. (*Mr. Bright.*) It was more like war ?—And they were cowards, which is another thing.

1232. (*Mr. Ewart.*) Do you think that more or less evil attends executions than used to do ?—It differs very much. At Müller's execution I think that there were more persons than I almost ever saw

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at the Old Bailey, and there were a great many at the execution of the pirates.

1233. (*Mr. Neate.*) What is your impression of the behaviour of the mob at Müller's execution?—I think that they behaved very well.

1234. (*Mr. Hunt.*) You did not see them, I suppose, till the convict came on the scaffold?—No; I come first and he follows. I and the culprit are the only persons there, and the behaviour of the crowd is as solemn as can be.

1235. We understand that all the bad behaviour takes place before that?—Yes.

1236. But that at the time of the execution there is very great solemnity?—Yes.

1237. Have you ever witnessed an execution anywhere except at Newgate?—I have seen a man in the act of being hanged at Oxford.

1238. Could you judge of the behaviour of the crowd there?—I have never taken any notice, unless one's attention has been drawn to it, as it is at Newgate.

1239. (*Mr. Bright.*) Is it not a great relief to you to hear that a prisoner under sentence of death, convicted upon circumstantial evidence only, confesses his crime?—Yes, it is a great relief, and to no man so much as to the culprit himself, that is the person to whom the relief is chiefly. But they almost always confess. I never knew but one who has died without confessing, that was a woman of the name of Wilson, who was convicted for poisoning a man and others, and of whose guilt there was no doubt; she did not confess, but I do not remember another case.

1240. (*Mr. Hunt.*) You do not know any case of a person whom you have supposed to have been innocent being hanged?—No, never; one has known it for some other things, but the authorities are always very attentive.

1241. What do you mean by "some other things." Do you refer to persons convicted of other things?—Convicted of other offences.

1242. But you never remember a case of a person being hanged who was innocent?—No, but the authorities are always very attentive; if you have a sensible case to lay before them the Judges and others will attend to you directly.

1243. (*Mr. Bright.*) I think you have said that 24 persons have been executed while you have been in Newgate?—Yes.

1244. That upon the average is little over one a year?—Yes.

1245. If you withdrew the five pirates whose crime was committed a long way from here, and had nothing to do with our population, the number would come to less than one a year?—It would.

1246. And you still are of opinion that the sacrifice of the life of that one man in a year is essential to the safety of the three millions of people in this metropolis?—I think so. It is not a question of saving life, because it is only a question of who is to die; whether an innocent man or a guilty man is to die. I do not think that you would save life by abolishing the punishment of death.

1247. You have no faith in the preservation of society depending at all upon what is called the reverence for human life; you think that punishment is the main thing?—I do not think that the reverence for human life is at all injured by the punishment of death.

1248. Do you think that when you have conversed about religious subjects for a fortnight, and have preached to an unhappy criminal, and have administered to him the sacrament, he is in a condition of much more apparent penitence than is often the case with those who die a natural death?—Yes.

1249. And you are not without hope that, looking at the nature of our religion and your faith in it, the man exchanges a hard world for one much better. Do you really think that the reverence for human life is not in the least degree impaired by hanging that man up before 150,000 people?—I do not think that the reverence for human life is injured by public executions.

1250. Do you recollect a young man of the name of Wicks being hanged at Newgate?—Yes.

1251. He shot his master in Drury-lane?—He did.

1252. Do you recollect the fact that he had been only a short time before to see an execution?—Yes.

1253. And that the same morning he ran as hard as he could go to see another person hanged?—Yes, he was a great execution seer.

1254. Do you recollect the statement which he made after he had seen it, that he snapped his fingers and said, "It is nothing, it is "only a kick," and then went home and shot his master. You recollect hearing that story, I dare say?—No, I do not remember that, I never heard it before; but it very likely may be true.

1255. (*Mr. Neate.*) Do not some prisoners die with a profession of total disbelief in religion?—I have known a Frenchman do that.

1256. Bartelemy?—Yes; but that occurs very seldom.

1257. Do you think that that is calculated to produce a very bad effect upon those who see the execution, or who know that a man is able to meet his death without any faith in the support of religion?—Yes. "I have no faith in God," were nearly the last words which Bartelemy spoke.

1258. You have not met with that in Englishmen?—No. There was an Italian who was executed shortly afterwards of the name of Burinelli, who was in a very different state of mind. He was penitent. Father Gavazzi, as he is called, came to see him, and was very much pleased with him.

1259. (*Lord Stanley.*) Has not one step been taken towards making executions comparatively private. Is there not something done now to conceal from the crowd a good deal of what was formerly seen?—Yes, we have curtains. Excepting from the windows opposite they do not see the execution.

1260. (*Mr. Bright.*) That was represented, in the papers, to have caused great dissatisfaction amongst those who came to see the execution. Was it so?—I do not know. I did not see any dissatisfaction. The police are always there in such large numbers, that there is no danger in that respect. It is a dangerous place for a crowd. There is a steep hill; and if you had not the barriers there you would have loss of life.

1261. May I ask where you were before you went to Newgate?—I was at Whitecross Street prison. The Court of Aldermen removed me to Newgate without my asking for it, or I should never have gone there.

1262. From whom did you receive your first appointment as the chaplain of a prison?—The magistrates of London.

1263. Had you had some other living or curacy before that?—I was lecturer of Horselydown and chaplain of St. Olave's Union, which latter appointment I hold still.

The witness withdrew.

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Mr. William Tallack examined.

1264. (*Chairman.*) You are secretary to the Society for the Abolition of Capital Punishment ?—Yes.

1265. Can you show by reference to the experience of our legislation during the last 30 years, that the abolition of Capital Punishment promotes a greater certainty of conviction in the prosecution of the worst offenders ?—The experience of our legislation during the past 30 years abundantly tends to show that the abolition of Capital Punishment promotes a greater certainty of conviction in the prosecution of the worst offenders. If it were abolished for murder, the results would probably be similarly favourable, judging from our own past experience and the present condition of other countries which have dispensed with the death penalty. I will proceed to illustrate this by statistics which I have drawn up. I should say by way of introduction, that I have taken for all principal crimes the statistics for the last ten years, from 1854 to 1863, and have compared with them the statistics of the ten years ending with what I may term the principal era of Capital Punishment, namely, ending with the year 1835, when a sudden and very considerable diminution took place in the number of executions generally. The first table to which I will refer is a table of general convictions, showing the per-centage of convictions arising out of commitments in two decades, namely, first, that from 1863 to 1854, and, secondly, the decade from 1835 to 1826, the latter decade being the period when enactments of Capital Punishment and the executions of the same were specially numerous. It is submitted that this table clearly indicates that the abolition of the death penalty renders the conviction and punishment of criminals much more certain than the enactment of that penalty. The low per-centage of convictions for murder in both decades is very suggestive. I find that in the first place, taking the present state of crime in this country, murder stands at the bottom of the scale as regards the certainty of conviction ; there are only 30 per cent and a decimal of murderers convicted out of every hundred commitments.

1266. (*Mr. Hunt.*) Do you include infanticide in that ? Do you include the list of females charged with the wilful murder of their illegitimate children ?—Yes.

1267. (*Mr. Hardy.*) Does your table show how many have been convicted of manslaughter ?—I shall come to that presently.

1268. (*Mr. Hunt.*) Are the other 70 cases acquittals or convictions of a minor offence ?—None of them are convictions ; some are absolute acquittals ; that can easily be seen by reference to the Judicial Statistics ; these are pure convictions.

1269. (*Chairman.*) 100 persons are committed for trial for murder ? —Yes.

1270. Thirty of those 100 are found guilty of murder ?—Yes.

1271. Then there remain 70 cases to be accounted for ?—Yes ; most of them are acquitted ; others are sent as insane to different asylums ; I think that that accounts for all of them under those two heads.

1272. Out of the 70 who are not convicted of murder, some are absolutely acquitted and some are acquitted on the ground of insanity. Are any of those 70 convicted of the minor offence of either manslaughter or concealment of birth ?—No, not any. Then, for the same 10 years, the per-centage of executions arising out of commitments for murder has been only 18 and a decimal out of every 100 commitments, so that every 100 commitments for the last 10 years have only resulted

in 30 convictions and 18 executions, that is lower than any other crime. During the 10 years from 1835 back to 1826 the convictions were 23 per cent., so that conviction is more certain now by seven.

1273. (*Mr. Waddington.*) Then the convictions are getting more certain than they were?—Yes. The next crime above murder is the crime of sodomy, which is no longer capital. The per-centage of convictions for sodomy is 32. The convictions for sodomy, as compared with 32 now, were 21 then. The next crime is rape, which is no longer capital. The proportion of convictions is now 39 per cent. ; it was only 16 per cent. Next comes manslaughter, which has not been capital during either of these two decades, and we find a remarkable uniformity in the per-centage of convictions. In the present decade it is 45 per cent.; in the former decade it was 48 per cent. Next above manslaughter comes arson. In the last decade the proportion of convictions was 56 per cent.; in the former decade, when arson was capital, it was only 25 per cent., being less than half. Attempts to murder come next. That crime has been capital during the whole of the two decades until 1861 ; the last execution was in 1861. In the last decade the per-centage of conviction is 60 ; in the former decade it was 41. Next comes assault with intent to ravish, which has not been capital during either of these two decades. Its present rate is 66 and a decimal ; it was formerly 61. That is another instance of the small difference in the per-centage of convictions in the two decades, where the crime has been non-capital all the time, as was the case with manslaughter. Next we come to sheep-stealing. Its per-centage of convictions now is 70. There has not been much change in that ; formerly it was 68 ; but then it was not capital, for, during most of the time of the former decade, it was only capital for one or two years. I am not certain that there was any execution at all for sheep-stealing during either of those years. I can tell presently when I come to another table. Similarly with horse-stealing, now the per-centage is 76, formerly it was 72 ; but still we see an increase in the convictions, although small. Next comes cattle-stealing. It is now 77 ; formerly it was 76. Next comes forgery. The per-centage is now 80 ; formerly it was 62. There has been no execution for forgery since 1829. And now I will take all crimes in the aggregate. The per-centage during the last 10 years has been 72 for all crimes, including not only these crimes, but every crime in the Judicial Statistics.

1274. Simple larceny included ?—Every crime. For the former ten years it was 70 per cent. for all crime, in the aggregate showing a remarkable uniformity, taking the whole. I should observe that I have omitted from this statement the crimes of burglary, larceny, and housebreaking, for the reason that, on looking over the criminal tables, and also on referring to some of Sir George Grey's speeches in Parliament, and to various documents, I have found it impossible properly to separate those crimes. I found that certain crimes were called burglary or housebreaking at one period, or were included under those heads, and were not at another ; so that I found it impossible, satisfactorily to myself, to draw out tables which should be fair comparisons for the respective periods ; but I have reason to believe that satisfactory results could be shown in the case of those crimes also, for I have seen some tables drawn up for short periods, for those crimes, which I have not here.

1275. (*Mr. Hardy.*) In respect of manslaughter have you any return of the number of persons who were convicted of manslaughter having been committed for murder ?—I cannot answer the question from the Judicial Statistics.

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1276. A great number of persons, as you know, are convicted of manslaughter who are tried for murder?—Yes. I may be wrong, but my idea is that the 30 convictions for murder would include those convictions.

1277. (*Mr. Waddington.*) A man who is indicted for murder is indicted for murder and manslaughter both; he may be found guilty of manslaughter upon the same indictment; therefore, in the Judicial Statistics, when a man is convicted of manslaughter, they put him under the head of manslaughter, as if he were indicted for manslaughter, which he is in fact.

1278. (*Mr. Hardy.*) What would appear to be acquittals may have been convictions for manslaughter?—If I understand rightly, I think that those convictions for manslaughter would be added, in the Judicial Statistics, to the convictions for manslaughter and not for murder.

1279. But they would appear as acquittals for murder?—No.

1280. (*Mr. Waddington.*) They would not appear in the murder cases at all?—They would not. When we come to manslaughter, we see that the per-centage is higher; it is there 45 per cent of convictions.

1281. (*Mr. Hunt.*) These papers are compiled from the Judicial Statistics?—Yes, back to 1834, beyond which period I have taken them from two Parliamentary papers which I have, which have been moved for by members, viz.; (1.) Parl. paper, "Criminal Offenders," No. 65, May 25, 1835, and (2.) Parl. paper, "Committals," No. 375, April 10, 1832: and I find in one or two cases slight discrepancies between the two Parliamentary papers and the Judicial Statistics.

1282. (*Mr. Bright.*) But nothing to interfere with the great question?—Nothing to interfere with the general question. I have here the details of each of these particular crimes, but I presume that the gentlemen of the Commission would not think it worth while to go into every case in detail with 15 sheets of statistics. Before passing to the next question, I will only refer to the table of committals.

1283. (*Mr. Waddington.*) What number were committed and put on their trial for murder in 1857?—70 were committed, 20 were convicted, and 13 executed. I now come to the table of committals, which is simply a copy from the introduction to the judicial statistics for 1859, p. 16, and without reading over the whole of this table, I will say that it includes, in the first part of it, the crimes of murder, attempts to murder, manslaughter, rape and attempts; and in the second part, burglary and housebreaking, robbery on the person, cattle, horse, and sheep stealing, arson and attempts, forgery and uttering forged instruments, coining and uttering, &c. There is seen to be an increase in most of these crimes, but the compiler of the judicial statistics observes at the same page 16, in reference to the latter portion of the table (all the crimes from burglary downwards):—"These comparisons are by no "means unfavourable." "The whole tendency of crime has been for "some years to the diminution of offences of violence, and the increase "of offences of planned theft and fraud. Skill in crime has succeeded "violence." Most of these crimes to which it relates had been capital during the former decade. I will read another quotation:—"In the 30 "years over which this comparison extends the population cannot be "estimated to have increased less than 40 per cent. (which would "account for a corresponding increase of crime), and property probably "in a much greater ratio." I will give another quotation from the same page:—"The commitments for rape and attempts to ravish, which "on the abolition of the Capital Punishment in 1841 at once attained a "higher rate, have since been without important change." This latter statement strongly confirms the popular statement that the capital

penalty, when enacted for rape, prevented prosecutions in many cases. Attempts to murder were capital, nominally and virtually, during the whole of the above 30 years. The last execution for attempted murder took place in 1861. Manslaughter was not capital throughout the 30 years. The invention of lucifer matches of later years is in itself sufficient to account for increased arson. Increase of education, property, and population, together account largely for increased forgery and coining. Cheap postage has also given some facilities for forgery and its concealment. Coining and forgery have not been capital, virtually, during the above period or any part of it. I have made these remarks because it is sometimes objected that the increase which has taken place has been in consequence of the removal of the capital penalty.

1284. (*Mr. Hunt.*) With reference to forgery, has there not been an alteration in the law of evidence with regard to the comparison of handwriting?—Yes.

1285. (*Chairman.*) Can you produce authentic documents showing the good results of the abolition of Capital Punishment in other countries?—Yes; I have here documents from a large proportion of the countries which have abolished Capital Punishment either entirely or virtually. I have been kindly furnished with three documents from the Governors of Rhode Island, Wisconsin, and Michigan by Mr. Bright. I will begin with Rhode Island.

"State of Rhode Island, Executive Department.

"Dear Sir, "Providence, March 21, 1864.

"Yours of March 4 reached me to-day, and I hasten to answer "your inquiries, which I am most happy to do. I have conversed with "our Supreme Judge, State Attorney, and Warden of State Prison, "and they support my own established views upon the subject, the "abolishing the death penalty. 1. When was the death penalty "abolished in the State of Rhode Island?—In the year 1852. 2 Is "life less secure, or are murders more or less frequent, than before?— "I do not think that its abolition has had any effect upon the security "of life. 3. Is the law against the death penalty sustained by the "public opinion of the State?—Very decidedly. 4. Are convictions "and punishments more certain than before the change was made? "—I think they are. 5. What is the punishment now inflicted on "such criminals as were formerly punished with death?—Imprison- "ment for life at hard labour. I have made very brief answers, and "am fully supported in the views. I hope you will find such infor- "mation as will aid you in your efforts upon the subject, in which all "should take a deep interest. If I have failed in my answers to "enlighten you, please ask such other questions as you may desire, and "I will be most happy to answer them.

"I have the honour to be, with great respect, very truly,

"James Y. Smith,

"Hon. John Bright, M.P., "Governor of Rhode Island.

"4 Hanover Street, London."

The next letter is from the Governor of Wisconsin.

"State of Wisconsin, Executive Office.

"Dear Sir, "Madison, March 29, 1864.

"Yours of the 4th instant is at hand. I regret that, owing to "other pressing duties, I have not time to give it the attention its "importance demands. I will only say that the demoralising tendency "of the execution of the death penalty by familiarising the people to "scenes of bloodshed, brutality, and violence, chaining the finer

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" sensibilities of our nature and exciting the baser passions, thus " tending to check moral growth, the great aversion of many to taking " life rendering it almost impossible to obtain jurors from the more " intelligent portion of the community; the liability of the inno- " cent to suffer so extreme a penalty, and be placed beyond the reach " of the pardoning power; the disposition of courts and jurors not to " convict criminals, fearing the innocent might suffer so extreme a " penalty, thus permitting those to go unpunished who would other- " wise receive due punishment; with other reasons I have not now " time to enumerate, long since convinced me that this relic of bar- " barism ought to be abolished." [This much is his opinion. We will now come to the facts of the case.] "Being a member of the " Senate of the State in the year 1853 I had the honour of advocating " and voting for the abolition of this penalty, and the pleasure of " seeing a law placed upon the statute book forbidding its execution, " and placing in its stead the penalty of imprisonment for life. The " fact that no legislature has since re-established it, and that after a " trial of 11 years the people find themselves equally secure, and " justice more certain than before the death penalty was abolished, " leaves little doubt of the wisdom of its repeal. The population of the " State in the year 1850 was 305,391, in the year 1860 the population " was 775,629. With this large increase of population we might " naturally expect a large increase of criminal cases, but this does not " appear to have been the case. Of course great increase of population, " great revulsions, and many other circumstances may for a given " period affect the number of criminal cases. I will give you the " result of the working of the imprisonment system in this State for " four or five years, about the time of the change, during which period " I think no extraordinary cause, except increase of population could " have influenced it. The death penalty was abolished, as I before " stated, in the year 1853. I have not the record at hand to show how " many murders were committed in that year. I find the number con- " fined for murders in the first degree, December 1, 1854, was six. " The number confined for murder, December 1, 1855, including " six above named, was nine. The whole number confined for murder " in the first degree, December 1, 1856, including those of past " years, was 12. The whole number confined for murder in the first " degree, December 1, 1857, including those named above, was 14. You " will see from this that four or five years after the death penalty " was abolished, notwithstanding the great increase of population, " there was no increase in this class of cases. With many apologies " for this hasty and imperfect statement, I am with great respect,

" Truly yours,

" Hon. John Bright, M.P. JAMES T. LEWIS."

The next letter is from the Governor of Michigan.

" STATE OF MICHIGAN; EXECUTIVE OFFICE.

" DEAR SIR, Lansing, March 23, 1864.

IN answer to your letter of 4th instant, inquiring as to the effect " of the abolition of the death penalty in this State, I shall perhaps best " meet your wishes by giving a brief history of the legislation of this " State on the subject. It should, however, first be explained that there " has never been any abolition of the death penalty for *treason* defined in " our constitution to 'consist only in levying war against the State, or in " 'adhering to its enemies, giving them aid and comfort.' This crime " rarely or never occurs in our State, independent of treason against the

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" Federal Government. No Michigan Court has ever investigated a charge " for such a crime. The Territorial Law of 1827 punished murder (the " offence as defined by the common law) with death, and the same penalty " was provided for killing a person, when the offender was committing " any unlawful act (felony or not) the probable consequences of which " might be bloodshed. The Revised Statutes of 1838, adopted soon " after the admission of the State into the Union, made first and " second degrees of murder by the following section :—'All murder " 'which shall be perpetrated by means of poison, or lying in wait, " 'or any other kind of wilful, deliberate, or premeditated killing, or " 'which shall be committed in the perpetration or attempt to perpe- " 'trate any arson, rape, robbery, or burglary, shall be deemed murder " 'of the first degree, and shall be punished with death. And all " 'other kinds of murder shall be deemed murder of the second degree, " 'and shall be punished by confinement in the Penitentiary for life, " 'or any term of years, at the discretion of the Court trying the same.' " A second (and the last) revision of our Statutes was made in 1846. " In those the distinction between the degrees of murder was retained, " but the crime in the first degree was to be punished 'by solitary " 'confinement at hard labour in the State prison for life.' A law of " 1861 provides that 'The convicts which have been or may be sen- " 'tenced to solitary confinement in the State prison at hard labour " 'for life may be released from solitary confinement and employed as " 'other convicts are, whenever and for such times as the inspectors " 'may by resolution direct.' No other crimes than those have ever " been punished capitally under Michigan laws, at least not since 1827. " I now answer your questions in order. 1. The death penalty (for " murder) was abolished March 1, 1847, when the Revised Statutes " of 1846 went into effect. 2. Life is not considered less secure than " before. Murders are probably less frequent in proportion to popu- " lation. Exact statistics are not easily attainable, and if obtained " might be deceptive. Twenty years ago the population of the state " was but about 300,000. The 'Upper Peninsula' and northern two- " thirds of the 'Lower Peninsula' was then almost an unbroken wilder- " ness. The northern border of settlements was then near the line of " the Detroit and Milwaukee R. R. About nine-tenths of the state is " now organized into townships and counties ; and we have a popula- " tion of about 900,000. But the northern counties are still very " sparsely settled, so that our proportion of 'border population' is " probably not very different from what it was in 1844. Then the " population was almost entirely agricultural. Now the mining of " copper, iron, and coal, the manufacture of salt, and the cutting and " rafting of lumber, have become large interests. Altogether the " effect has been to bring into proximity dissimilar classes, and thus to " increase the probabilities of frequent crime. Previous to the abolition " of the death penalty murders were not unfrequent ; and many trials " were had, but convictions were rarely or never obtained. It became " the common belief that no jury could be found (the prisoner availing " himself of the common law right of challenge) which would convict. " After the adoption of the Revised Statutes of 1846, and before they " went into effect, counsel are known to have advised persons accused to " take the chances of a trial under the old, rather than (by getting " causes put over a term) under the new law. Since the law abolish- " ing this penalty came into force, the average population of the State " has been about 600,000, and there have been convictions in the " different years as follows :—In 1847, 1; 1848, 3 ; 1849, 1; 1850, 0; " 1851, 3 ; 1852, 1 ; 1853, 2 ; 1854, 5 ; 1855, 4 ; 1856, 3 ; 1857, 3 ;

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" 1858, 3 ; 1859, 2 ; 1860, 3 ; 1861, 1 ; 1862, 1 ; 1863, 0 ; 1864, 2 ;— " total, 37. Of this number five received new trials, upon which they " were acquitted. One has been pardoned, one escaped, seven have " died, and 23 remain in the prison. This record is procured from the " principal keeper of the State prison, and does not include the con- " victions, if any, where a new trial was granted before sentence. " 3. There can be no doubt that the public opinion of the State sus- " tains the present law, and is against the restoration of the death " penalty. During the 17 years since the change no attempt sufficiently " serious to give any alarm has been made to restore the old law. " 4. Conviction and punishment are now much more certain than " before the change was made. Murder requires no greater amount of " proof than any other crime, and it is found practically that a trial for " murder excites no very unusual interest. Mr. William L. Seaton, " the agent or principal keeper of the prison, and who has been con- " nected with it many years, remarks in his letter of this date, " communicating the facts, I have cited as to convictions since 1847, " that 'being personally acquainted with all who have been convicted,' " and with most of the facts, he is 'very firm in the opinion that not " 'more than four or five of the 37 would ever have been convicted " 'had hanging been the penalty.' I am in fact persuaded that too " many convictions occur. In two cases where applications have been " made for pardons, I am satisfied that the crime was manslaughter " and not murder. 5. The punishment, as before stated, for murder in " the first degree, is 'solitary confinement at hard labour in the State " 'prison for life.' Since 1861 all this class of prisoners have been " employed as other convicts are, the inspectors having the power " (never likely to be exercised) of remanding them to their solitary " cells. It had been found impracticable to keep prisoners of this class " at work when in their cells, on account of the danger of supplying " them with tools, and that there was a probability in most cases of " their becoming insane. These considerations led to the passage of " the law of 1861, and it has seemed to work well. I should perhaps " remark that there have been about two-thirds as many convictions " for murder in the second as in the first degree, and that the convic- " tions for manslaughter have been comparatively few—less than half " those for murder in the first degree. Regretting my inability to " give you more accurate statistics without considerable delay, and " trusting that you may soon accomplish a reform demanded by the " spirit of the age, and now able to be recommended as successfully " tried, and no longer an experiment,

" I am your obedient servant,

" Hon. John Bright, M.P., " AUSTIN BLAIR.
" 4, Hanover street, London."

The letters which I have here are only a small portion of what I have asked for from all parts of the world. Amongst others I wrote to a well-known lady, Mrs. Harriet Beecher Stowe, the authoress of "Uncle Tom's Cabin;" I wrote as Secretary to the Society for the Abolition of Capital Punishment, and she writes to the Committee: this is her reply :—

" GENTLEMEN, " Hartford, October 28, 1864.
" BEING ignorant of the subject of your letter, I forwarded it to " Professor T. C. Upham of Maine, who has given attention to the " subject. I have enclosed his letter, which I hope may be of use.

" Very truly yours,

" H. B. STOWE."

Professor Upham is Professor in Bowdoin College, in the State of Maine, and is well known as the author of several works on Theology as well as Moral Philosophy. His letter is as follows :—

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"RESPECTED MADAM, "Brunswick, Maine, Oct. 15, 1864.

"YOU request me to give an answer to certain inquiries pro- " posed to you by Mr. Tallack, Secretary of the Society for the " Abolition of Capital Punishment in London. The state of my health " will not allow me to go very fully into the subject, nor am I able to " say that I possess the means of information which will enable me to " speak with entire confidence. Nevertheless I think I should be " likely to know, as I have long been interested in the subject, and " have often made inquiries. In answer to Mr. Tallack's first inquiry, " namely, what has been the result of the abolition of the death- " penalty in Rhode Island, Michigan, and Wisconsin, I would say, so " far as my information goes, the majority of the people continue to be " satisfied with the change. Were it otherwise in any considerable " degree, they would be likely to return to their former system. I " have not learned that any of the States of the American Union " which have abolished Capital Punishment, or have greatly modified " their criminal codes in that particular, have taken any steps back- " ward. I understand that some attempts of this kind have been " made in Rhode island and Michigan, but have failed. The second " question proposed by Mr. Tallack is, whether the system of private " executions is free from evils attendant on public ones, and whether " there are not some special disadvantages connected with them ? I " believe it is the general sentiment that the immense evils attendant on " public executions are avoided, for the most part, by the present " method, although some may think that we lose something in the " matter of example, and also that in certain conditions of society the " private method might possibly be perverted to unjust purposes. In " the State of Maine, where I reside, I regard the public sentiment as " strongly in favour of private executions as compared with public ones. " The system of the State of Maine, which has existed about " 30 years, is somewhat peculiar. It recognizes the right of Capital " Punishment, but limits its infliction to the crime of murder. " It requires also, that it shall not be inflicted until the expira- " tion of a year, which gives time to the criminal for reflec- " tion and repentance, and also for the appearance of new evidence " if he should happen to have been unjustly condemned. At the " expiration of that time, when public sentiment against the criminal " has become less excited, it is left optional with the Governor of the " State to order him to execution or to detain him in prison according " as his views of the good and safety of the State may require." [The Commissioners will remember that this is not a State to which we have referred as a State where Capital Punishment is absolutely abolished, though it appears to be virtually so.] " This system, with- " out giving up the principle of Capital Punishment, is, practically, " almost an abolition of it. During the thirty years of the existence " of this system, one person only has been executed under it, who had " added to his previous crime that of killing the warden of the State " prison. I am inclined to give the preference to this system over " any other with which I am acquainted. Many things can be said in " its favour, and I have yet to learn that the people of the State do " not generally feel as secure as they did under former systems. Yet " I think it ought to be added that much of this feeling of security is " to be ascribed to the temperate habits of the people, and to the great " pains taken to educate all classes. On the third question, namely,

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"whether imprisonment with hard labour, for life, or for a term of "years can be adopted as a safe substitute for the gallows, it is "certainly right to say that the experiences of this country look "favourably in that direction. It is right, in my opinion, to remember "that the criminal is still a man, and while we make the protection of "society the first object, we are not to cease to do him good. In some "cases at least, only the Infinite mind can understand the amount of "his temptations and sufferings. And we all stand in need of forgive-"ness. Dear Madam, I have thus briefly expressed my opinions; it "is all I can do, in my present situation; if you think them of any "worth you may transmit them to Mr. Tallack.

"Respectfully and sincerely yours,

"Mrs. H. B. Stowe. THOMAS C. UPHAM."

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Friday, 16th December 1864.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

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HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

Mr. WILLIAM TALLACK further examined.

1286. (*Chairman.*) Can you produce authentic documents showing the good results of the abolition of Capital Punishment in other countries?—Before proceeding to continue my answer to that question, perhaps the Commissioners will permit me, just for a minute or two, to refer to a statement which Mr. Hunt made yesterday with reference to my statistics. In order clearly and unmistakably to explain with reference to the convictions and committals for murder, I have this morning made a very brief extract from the Return of Judicial Statistics for 1863. I find there, under the head of "Murder," committed for trial, 83; convicted, 29. I have analyzed those two parts.

1287. (*Mr. Hunt.*) To what page do you refer?—Page 45. I merely have to do with those committed for trial for that particular crime.

1288. (*Mr. Waddington.*) A certain number of those convicted of manslaughter were committed for murder?—Yes, but they do not appear as such in the Judicial Statistics. I base all my statistics of per-centages on the Judicial Statistics. There were committed for trial, 83; convicted, 29. This is the analysis of the 29 who were convicted: 22 were executed; seven, having having had their sentences commuted, were ordered to penal servitude for life. Of the remaining 54, seven had no bill found, and were therefore not put on trial; 34 were found not guilty, and acquitted accordingly; seven were acquitted as insane, and six were found or declared insane; so that none of the 54, making up the 83, were convicted of manslaughter or other crimes.

1289. (*Mr. Hunt.*) No bill was found in the case of seven, and 34 were found not guilty on the verdict of the jury, making a total of 41. Nearly exactly half the number who were tried for murder were convicted. You deduct those who were acquitted as insane, but they were not acquitted because they did not commit the crime, but because they were not responsible?—Yes.

1290. I do not think that that will give a fair account of the matter, because they were virtually convicted of the crime, but were held not responsible?—But they were not remitted to the punishment of death. In reply to the question which the Chairman has addressed to me, I read yesterday four important letters relative to the experience of the abolition of Capital Punishment in America, and I have little more to add with respect to America except to read extracts from two letters. I will first read an extract from a letter addressed to me by M. Louis Fayette, gaoler of the provincial gaol at Montreal, dated 27th September 1864. The part which I wish to read is the following. (A good deal of the letter is merely explanatory, that he cannot give me the information for which I asked.) He says, "Capital Punish-"ment was virtually suspended here" (in Canada) from 1838 to "1858, a period of 20 years. The sentences to Capital Punishment "passed during that time were, by the exercise of the Royal "Prerogative, commuted to imprisonment for life in the Provincial "Penitentiary at Kingston; and the executions since the begin-"ning of 1858 (five in number) have all been public." I submit that if in Canada they could do without executions for 20 years, although they appear since to have returned to Capital Punishment, there could not have been any very great public inconvenience felt, more particularly when we find that there were only five executions in the years which have since elapsed.

1291. (*Mr. Waddington.*) Capital Punishment was never abolished there by law?—No.

1292. (*Mr. Hunt.*) Have you any statistics of the number of murders committed during the 20 years when Capital Punishment did not exist?—No; I have written particularly for it to the superintendent of the Penitentiary at Kingston, but have not yet received any reply.

1293. (*Mr. Bright.*) Was the extract, from the letter which you have just read, in answer to a letter of yours?—Yes.

1294. He does not give any reason for the difference?—No, he does not.

1295. It might be a change of Governor-General?—Yes.

1296. (*Mr. Neate.*) Was there practically a suspension of Capital Punishment during Sir Edmund Head's governorship?—I am unable to answer that question. I have another letter addressed to me, in reply to a letter asking for information, from the Governor of the Sing-Sing Prison for the State of New York, dated, "Sing-Sing, September "24th, 1864." I presume that it will not be necessary for me to take up the valuable time of this Commission by reading the whole of the letter, inasmuch as Capital Punishment has never been abolished in the State of New York, and this letter is particularly with reference to the substitute for Capital Punishment, or life-long sentences. I had put to him a question upon that point, and he says, "With regard to the "effect of 'life-long sentences,' I can positively assert that they are "carried out, at this prison at least, with good effect, for we have now "23 convicts under sentence for life, and I see no difference between "those for life and those for five or ten years, their health and reason "being equally good. In fact, such few cases as we have where reason "is affected are usually with convicts of a comparatively short term.

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"The silent system is yet carried out in this State, and I consider it "necessary for the preservation of discipline, and not injurious to the "convict. We do not adopt the solitary system, as the various "branches of manufacturing carried on in our prisons will not admit "of it, neither do I consider it necessary for the good government of "convicts."

1297. (*Mr. Bright.*) He does not state how long any one of those convicts has been in the prison?—No; and it is to be regretted that he does not. I may mention, before taking the next country, that I was in America about four years ago, and had an opportunity of seeing the separate system, in apparently very healthy operation, with prisoners of various sentences. I am not able to say positively whether there were any there for life, but I have no reason to suppose that it was otherwise. It was in the large prison of Philadelphia. I passed from cell to cell, and I found that by having solitary confinement combined with vigorous occupation for body and mind, the prisoners appeared to be healthy and comfortable, using the word "comfortable" of course in a limited sense. After the evidence which I have presented from the three States of Rhode Island, Wisconsin, and Michigan, and that in the large State of Maine, where there has only been one execution for 30 years, I submit that that alone is sufficient to warrant us in making a trial of the abolition of Capital Punishment in this country. It has been remarked that the circumstances of America are different from ours, and that has been made an objection against our plea for abolition here. I will acquiesce in the statement that the circumstances of America are different, but they are so different that on that very account, if Capital Punishment can be safely abolished in America it can be more safely abolished here. For in America there is not that respect for law and that reverence for authority which there is happily in this country.

1298. (*Mr. Waddington.*) Can you give us the number of murders which take place on an average of years in the State of New York?—I cannot.

1299. I have heard that they are very frequent?—I believe that in the city of New York they are very frequent; but that is because New York has been described as a sink for the whole world. The very worst characters find their way to New York.

1300. (*Mr. Hunt.*) With regard to the States where capital punishment is abolished, have you any information with reference to the number of murders committed in proportion to the population?—No; except what I read yesterday.

1301. (*Mr. Neate.*) Did you ever hear that criminals had been attracted to those parts of the United States where Capital Punishment had ceased to exist?—No, I have not heard it; but if they had, we should have seen the results in the increase of murder, which would have been noticed, and would have contradicted the statements which I made yesterday.

1302. (*Mr. Ewart.*) I think that one of the questions which you put to the American States was, whether life was less secure in consequence of the abolition of Capital Punishment. What was the answer that you received?—That it was not less secure.

1303. (*Mr. Bright.*) Have you any facts with regard to any country in Europe?—I am now about to proceed with Europe. Here is an extract from a letter which I received at the commencement of this year, from the President of the Department of the Interior for Switzerland. It is dated "Berne, January 4th 1864;" and is signed by Schenk, a gentleman who has just been elected the President.

1304. (*Mr. Waddington.*) It is the Department of the Interior of the Federal Government ?—Yes. I need not read the whole of the letter. I will confine myself to the part which relates to the two cantons of Switzerland in which Capital Punishment had been abolished when this letter was written. Since this letter was written another canton has abolished it. It appears that Capital Punishment has been abolished in the cantons of Freiburg and Neufchatel. With reference to the canton of Freiburg, the minister writes as follows ; I have a translation :—"But we must inform you that in canton Freiburg, "where Capital Punishment was abolished in the year 1848, its re-"imposition has been very recently called for. The Grand Council "of the canton concluded not to entertain the petition separately, but "only in connexion with the approaching revision of their statute "book. Meanwhile an investigation was instituted to determine "whether crime has increased or not in the canton Freiburg, since "their abolition of Capital Punishment. The result of this investi-"gation was, that neither crime in general, nor in particular crimes "against life and safety, have been in any way, relatively, more "numerous in the 15 years following the abolition of the punishment "of death than in the 15 years which immediately preceded its repeal. "We hope that the result of this investigation will have a decided "influence on the decision of the Grand Council."

1305. (*Mr Hunt.*) Then is the law restored ?—We have no information to that effect.

1306. (*Mr. Waddington.*) What was the cause of their calling for its restoration ?—From one or two atrocious crimes.

1307. (*Mr. Hunt.*) It is important to know what is the population, and how many murders there had been before ?—I am unable to answer that question. I have no information separately from Neufchatel ; but I may state that recently, during the autumn of the present year, the Grand Council of another Swiss canton, namely, Zurich, abolished Capital Punishment. So that that looks as if their experience was favourable. They did so in October 1864.

1308. What did they substitute ?—I believe imprisonment for life. I will now refer to Tuscany, which was the first country to abolish Capital Punishment. I have here a long official document, which was sent to me by the Marquis d' Azeglio, lately the Italian Ambassador in London, in answer to my application. Unless the Commissioners wish it, I will not read the letter, inasmuch as it is merely introductory, and verifying this statement, which bears the official stamp of the Court of Turin. It is written in Italian ; but I will read an extract respecting it in English. This is an extract from the Report of the Society for the Abolition of Capital Punishment for the present year. "Through the "courtesy of the Italian Ambassador (the Marquis d'Azeglio) the "Society has recently obtained from Italy some very interesting "official statements respecting the abolition of death punishment in "Tuscany, the first European state to adopt such a course. It is im-"portant to briefly record the facts in relation to this country. After "the death of the Grand Duke Leopold, who for a quarter of a century "had first virtually, and then formally, abolished Capital Punishment "in Tuscany, the Austrians, dreading the effects of political move-"ments in Italy, secured the re-imposition of the extreme penalty in "1790. This continued in force until 1847, when the then reigning "Grand Duke a second time abolished Capital Punishment. In con-"sequence, however, of the prevalence of revolutionary efforts in Italy, "in connexion with the events of 1848, it was again deemed essential "to impose the penalty of death which was re-enacted in 1852.

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" But in April 1859, after the annexation of Tuscany to the kingdom " of Italy, a law was passed totally abolishing the punishment of death " in that state for the third time. In 1860 a further decree was " passed confirming this abolition, and providing for the substitution " of permanent imprisonment in all cases previously capital." I have since received information that the recently issued Italian code, whilst establishing that code over all Italy, makes special exception virtually for the continuance of the abolition of the punishment of death in Tuscany. I am able to state, from well authenticated information, that the effects in Tuscany were most satisfactory throughout the 25 years of the first abolition.

1309. (*Chairman.*) Up to what date was that?—For 25 years preceding 1790, under the reign of the Grand Duke Leopold. There were a very small number of murders in Tuscany compared with the adjoining states.

1310. (*Mr. Neate.*) Can you give any particular information upon that point?—Not in minute detail, but we have the general statement of the Grand Duke.

1311. (*Mr. Bright.*) Is it not a well-known fact that the reimposition of the punishment arose from political considerations, and not from social considerations affecting ordinary crimes?—Yes. I can quote a statement made by the Grand Duke. The Grand Duke of Tuscany says this (I have extracted it from a work on Capital Punishment) :—" After 23 years' trial of the abolition of Capital Punishment, " the alteration, instead of increasing the number of crimes considerably, " diminished that of the smaller ones, and rendered those of an atrocious " nature very rare." I will now refer to Oldenburg and Nassau. I have here a letter from the Secretary of the High Court of Judicature in Oldenburg, Monsieur Niemöller, dated Oldenburg, 10th December 1864, in which he informs me that Capital Punishment was abolished in that State in 1849, but that it had been virtually abolished, with the exception of one execution previously, since 1814.

1312. He merely gives those naked facts?—Yes.

1313. From 1814 to 1849 there was only one execution?—Yes.

1314. And in 1849 the law was changed?—Yes.

1315. Therefore supporting the view that they found the practical abolition advantageous?—Yes. I will now read an extract from a letter addressed to me by Professor Mittermaier from Heidelberg, dated " Heidelberg, 6th December 1864," and signed, " Mittermaier." Speaking of the three States of Anhalt Dessau, Nassau, and Oldenburg, which have abolished Capital Punishment, the Professor says :—" Unfortunately, in the three States official criminal tables are not pub- " lished; but I am in correspondence with the eminent lawyers of " Nassau and Oldenburg, and can assure you that, according to the " letters received, the general opinion among the lawyers and citizens " of Oldenburg and Nassau is, that the number of murders is not " increased, and that there is not any reason to re-establish the punish- " ment of death. A consolatory experience is that criminals who have " perpetrated grave murders, but condemned to imprisonment for life, " were totally reformed, and, after 12 or 15 years, pardoned. The ex- " perience has proved that the conduct of these men (almost of the " majority) was, after their liberation, exemplary. We have several " examples of this good operation concerning murderers condemned to " imprisonment for life in the prison of Bruchsal in Baden." [I should say that in Baden Capital Punishment has not been abolished.] " Ac- " cording to the penal code of Baden, every criminal condemned to " zuchthaus (travaux forcés) is retained in the prison during six years

" in solitary confinement. After six years the criminal is brought in " the prison with others to common labour, if he does not prefer to " remain in isolation. We have fortunately in the prison of Bruchsal " a teacher who takes care, by his excellent moral and intellectual " information, to exercise a salutary influence on the criminal. In " general we are much satisfied with our prison system."

1316. (*Chairman.*) Of course you are not able to give any evidence upon it, but it would appear from that gentleman's letter that persons condemned to perpetual imprisonment for murder are released at the end of 12 or 15 years?—That would appear in some cases. I am unable to give particulars.

1317. That is on account of good behaviour?—It would appear so.

1318. (*Mr. Waddington.*) Is it not part of Professor Mittermaier's argument against Capital Punishment that it is the duty of all states to reform criminals if possible, and that Capital Punishment not only does not carry out that object but prevents it?—Yes. I have received information that Capital Punishment was abolished last year (1863) in the three Republics of Venezuela, Ecuador, and New Granada, in South America. I have written to the representatives of those three countries, but have only received a reply from one. This is a letter signed " Frederick H. Hemming," Consul of Venezuela, and dated " London, " December 7th, 1864." He says, " You are quite correct in saying " that the punishment of death has been entirely abolished in Vene- " zuela." It has also been abolished in Bremen. Here is a letter dated " Hanseatic Consulate General, London, 12th December 1864," signed, " James F. Wulff," Consul General:—" Sir,—I received your " note of the 4th December, and upon inquiring at Bremen I am now " enabled to inform you that Capital Punishment was abolished in that " Republic in the year 1849. To the best of my knowledge, nothing " similar has been done in Hamburg nor Lübeck." That is the whole of the letter. With regard to Russia, I have had exceeding difficulty in getting information with respect to that country. I applied several times to the Ambassador, and have written to our representative in Petersburgh, but I have not received any reply officially. I have only received this letter, which is marked " private." This letter entirely denies the statement that the punishment of the knout is substituted in Russia for the punishment of death. I will conclude this part of the subject of foreign experience with a simple reference to the experience of Belgium, where Capital Punishment has never been absolutely abolished, but where, for a certain period, it was virtually abolished. It appears that in the period from 1800 to 1804 there were 235 executions in Belgium, and 150 convictions for murder. In the next period of five years, from 1805 to 1809, there were 88 executions and 82 convictions for murder; and so it went on, executions and convictions for murder both decreasing through quinquennial periods till the quinquennial period from 1825 to 1829, when there were only 22 executions, as compared with 235 at the beginning of the century, and only 34 convictions for murder.

1319. (*Mr. Neate.*) Had there been any alteration in the law?—No; but in the period from 1830 to 1834, five years, there were no executions at all, and then the convictions for murder sank to 20 in the five years, which probably will be considered as an inevitable margin even in a country well constituted. It is sometimes stated, when such statistics as these have been read, that the murders were not fewer because the executions were fewer, but that the executions were fewer because the murders were fewer. Now here (specially showing the contrary) we find that after those five years of virtual abolition, through the fears of some persons,

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it was resolved to reimpose Capital Punishment practically, and in the five years from 1835 to 1839 four executions took place in Belgium. What was the consequence? Instead of only 20 murders, as in the preceding five years, now that Capital Punishment was reimposed there were 31 convictions, an increase of more than 50 per cent. There had been a steady decrease all the time from 1800 down to 1835, and directly Capital Punishment was reimposed the number of murders increased more than 50 per cent.

1320. (*Chairman.*) Surely, if that argument went for anything, it would show that the reimposition of Capital Punishment increased the crime of murder?—Precisely so.

1321. Do you think that the more you hang for murder the more murders you have?—Probably. I submit that this foreign evidence, from countries under such various circumstances, is exceedingly confirmatory of the practical safety of abolishing Capital Punishment.

1322. (*Mr. Ewart.*) Have they not abolished Capital Punishment in Portugal?—Virtually, if not really.

1323. (*Chairman.*) Can you refer to the opinions of eminent jurists respecting the first proposals to abolish Capital Punishment in this country, with reference to subsequent opinion and results?—Yes, I find in Basil Montague's Work on Capital Punishment a report of the debates in the House of Commons and the House of Lords in the year 1810, when it was proposed to abolish Capital Punishment for shop lifting and stealing from canals, one of the very first proposals of the kind ever made in this country; and I find that even at that date the most eminent jurists in the country strongly deprecated any innovation in the way of altering Capital Punishment, on the ground of its danger to the public security and the necessity of Capital Punishment as a deterrent. The Solicitor General in opposing Sir Samuel Romilly's motion said, "I am proud "to confess that I am an enemy to the opposition of theoretical "speculation to practical good." Colonel Frankland said, "So far "from having any disposition to alter the existing law, if I rightly "understand what has been said by some honourable gentlemen who "have spoken this night, all the Judges of the land are convinced "that the proposed reform is fraught with consequences the most "injurious." Then the Solicitor General continued, "In the course "of my professional practice I have had frequent opportunities to "observe the conduct of prosecutors, of witnesses, and of juries, and "I never observed that the fear of inflicting the punishment of death "possessed any of the powers this night ascribed to it." In the same year, on May the 30th, 1810, in the Lords' debate on the same proposal, Lord Ellenborough said, "I trust your Lordships will pause "before you assent to an experiment pregnant with danger to the "security of property, and before you repeal a Statute which has so "long been held necessary for public security." Further, Lord Ellenborough stated, "I am convinced, with the rest of the Judges, "public expediency requires there should be no remission of the terror denounced against this description of offenders." Further, he said, "Such will be the consequence of the repeal of this Statute, that "I am certain depredations to an unlimited extent would be imme-"diately committed." Speaking of the other Judges, he said, "They "are unanimously agreed that the expediency of justice and public "security requires there should not be a remission of Capital Punish-"ment in this part of the criminal law." Lord Ellenborough again rose and said, 'My lords, if we suffer this bill to pass we shall not "know where to stand, we shall not know whether we are upon our "heads or our feet." After that, Lord Lauderdale, speaking of Sir

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Samuel Romilly's motion, said, "The humane and learned mover of "these bills in the other House has proceeded with his usual mode- "ration and soundness of judgment, not upon idle or doubtful specu- "lation, but upon facts and the acknowledged principles of human "nature. He has stated facts, he has appealed to positive documents; "he has shown that the laws as they now stand are not executed "once in a thousand instances, and that their not being executed "leads to the contempt and more frequent violation of them. What "has been opposed to these facts?—Other facts?—No.—What then? "—Arguments?—No; but the vague cry of modern philosophy has "been raised in answer to all objections. Those who oppose the "repeal of these obnoxious Statutes are loud in demanding facts, and "when facts, undeniable, unanswerable facts are given, then they "turn a deaf ear to those facts." I may further observe that from time to time many eminent authorities and statesmen have made objections on this subject, adducing objections which are for the most part imaginary, such as for instance that warders would be afterwards killed. Now we have only about one instance of this, or scarcely any; and with regard to a substitute, we might say, what is the substitute now of the Home Office? In the cases of murderers whose sentences are at present commuted, there is not such practical difficulty in finding a substitute.

1324. Can you give instances exemplifying the statement that Capital Punishment peculiarly promotes the escape of the guilty, or prevents the execution of justice, by its being attended with special difficulties, which do not accompany secondary penalties, or at least not in an approximate degree?—Yes. I can state several instances with reference to the difficulties of juries and the public, in regard to obtaining evidence sufficient to warrant an irreparable sentence, especially when the evidence is only circumstantial. I can also give instances where innocent men have been convicted. I will refer to a recent case (and I may say that I shall take all my cases from recent years—since 1850), showing even now that there does exist a possibility of an irreparable mischief being committed, especially in reference to capital trials. It is the case of Charles Mallet, who was sentenced to death at the Central Criminal Court in 1854, and he was subsequently found to have been innocent. On December 13th, 1854, Charles Mallet was charged at the Mansion House, before Sir R. W. Carden, with "atro- "cious assault and robbery" on Louisa Harrison, a delicate looking young woman, the wife of a master carpenter residing in Aldgate.

1325. (*Mr. Waddington.*) That was not a murder case?—No; but sentence of death was passed. Mrs. Harrison swore that he had robbed her and beaten her repeatedly, drawing much blood. Sir R. W. Carden said to her, "Are you quite sure that the prisoner is the person who "assaulted and robbed you"?—*Witness.* "Perfectly certain of it." She then deposed that she had previously seen him several times. Mr. J. H. Cooke, surgeon, deposed to finding (on the day mentioned) the prosecutrix, Mrs. Harrison, faint and insensible. "Her face was "covered with blood, which flowed from two abrasions on the right "side and a blow on the nose. She had received a blow at the back "of the head, from which blood also flowed, and there were four or "five bruises on the arms, which evidently arose from severe pinch- "ing." "She had the appearance of having been violently abused." The prisoner protested his innocence, but was committed for trial at the Central Criminal Court, and was tried there accordingly. "He steadily denied any knowledge of the transaction. His defence "was an alibi, which not only failed, but the evidence somewhat

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"strengthened the case against him. He was found guilty, and "sentence of death was recorded against him, and he was ordered "to be transported. In February Mrs. Harrison made a charge "against a man and a boy, whom she accused of perpetrating "an outrage upon her of a similar nature. These accusations were "immediately discovered to be unfounded, and attention was once "more turned to the charge upon which Mallet had been convicted, "and a little investigation plainly proved that the story was a fabri- "cation from beginning to end. In consequence, Mallet, whose cha- "racter was otherwise good, received a free pardon." I will not take up the time of the Commission by entering into the details of two other cases, but will merely refer to them. The first is the case of John Markham, who was tried at the Central Criminal Court in 1856 for forgery. The jury had "no hesitation" in bringing in a verdict of guilty, yet it was subsequently proved that he was innocent.

1326. (*Mr. Bright.*) Did he receive a pardon?—I presume so. I will merely refer also to the case of Samuel Gardner, who was tried at the Central Criminal Court in 1862. This is a case showing the difficulties which arise. The evidence was entirely circumstantial. A verdict of guilty was brought in, and the Lord Chief Baron decidedly approved of the verdict of guilty. The man protested his innocence, but the public voice was "unanimous" (this is a quotation from the Annual Register) for a remission, and the sentence was commuted. With reference to the difficulties as regards circumstantial evidence, I will refer to one particular case, the case of the Reigate murder in 1861; that is an interesting case from the peculiar complication which existed. It was the case of Johann Carl Franz, who was tried for a murder at Kingswood, near Reigate. Of this, the Annual Register for 1861 remarks, "The case presented in a most "curious and marked manner the difficulties which attend all mere "circumstantial evidence. A series of strong coincidences, that ap- "peared to establish incontestably the theory of guilt, was met by "another series of coincidences tending as strongly to confirm the "theory of innocence."

1327. (*Mr. Waddington.*) Is that a case where you say that a guilty man got off on account of Capital Punishment?—No; it is rather to show the difficulties of the jurors and the dangers.

1328. (*Chairman.*) Can you instance cases of an evident unwillingness of jurors to convict, in consequence of the penalty being capital?—I will refer to the case of the Maidstone jurors at the trial of Mansell for murder in 1856. At the Maidstone assizes on December 19th 1856, before Mr. Baron Bramwell, Thomas Mansell, a soldier, was tried for the murder of Alexander McBurnie, a corporal, at Dover, by shooting him. At the trial "it was intimated that one of the jury "entertained a conscientious objection to the punishment of death, "and desired to be excused from serving. He was accordingly allowed "to leave the box and another juror was sworn in his place."—I am now quoting from the Annual Register.—"The jury list consisted of "59 jurymen, of whom 12 were engaged on another trial. The pri- "soner's counsel challenged 20, the Crown challenged others, and "none remained but Maidstone men. All these were ordered to stand "by on the objection of the Crown," because it was stated that Maidstone men had a peculiar objection to Capital Punishment. "A very "learned squabble ensued, which gave occasion to the Judge to read "a severe lecture to all whom it might concern, on the wickedness of "a man getting into the jury box and doing otherwise than he is "sworn to do. This of course gave the prisoner's counsel the oppor-

" tunity of saying that his client's case was prejudiced by the inter-
" ference of the Judge. Three jurymen were taken as proposed from
" the other jury, but before they were sworn one of them declared him-
" self to have a conscientious objection to the punishment of death, and
" desired to be excused from serving. He was ordered to stand by,
" and another from the other jury was sworn in his place. Upon this
" state of things, Mr. Russell raised a variety of technical objections,
" and a Writ of Error was sued out, in order to submit the case to the
" consideration of the Judges." After a delay of seven months, the prisoner was executed at Maidstone. I will also refer, merely as another instance of the same thing, to the objection of Maidstone jurors again at Burton's trial in 1863. Burton was tried last year for a murder at Chatham.

1329. (*Mr. Bright.*) It was a boy who " wanted to be hanged " ?—Yes ; and I now quote from the " Chatham News " of March 21st, 1863. " When the case was called on, considerable difficulty arose in forming
" a jury. The counsel for the prosecution objected to Maidstone men,
" on account of the notorious fact that there is an association there
" against Capital Punishments, on which account a remarkable case "
(the case just alluded to) " arose here a few years ago (which was
" carried to the Court of Criminal Appeal), as to the right of the
" Crown to set aside jurors without special cause assigned, so long as
" a sufficient number remained upon the panel to form a jury, the
" counsel for the Crown having in that case ' in like manner ' desired
" Maidstone men to stand aside for the reason above stated. On the
" other hand the counsel for the prisoner objected to Chatham or
" Rochester men." Then it appeared that they finally put aside all Maidstone and Chatham men from the panel. I will refer to a case which was tried a few days ago, namely, on the 9th of December 1864, at the Hertford Assizes, and which is reported in the " Times " of the 10th of December. It is the case of George Savage who was tried before Mr. Baron Channell for an attempt to murder. " The jury then
" considered of their verdict. After consulting some time, one of
" the jury turned round, and asked whether if the prisoner was con-
" victed he would suffer death ? *The Learned Judge.* You have no
" right, sir, to ask that question. Several of the jury desired it to be
" understood that they had not wished it to be asked. The juror said
" he alone wished to ask it. *The Learned Baron.* Sir, you ought,
" when you are in the jury box, to deliver your judgment according to
" the evidence. You are responsible, upon the oath you have taken,
" for finding a true verdict according to the evidence, leaving the law
" to take its course. In this particular case however, that there may
" be no unfounded notion in the mind of any one of you, I may tell
" you, that though it was a capital offence not long ago, it is so no
" longer. But I do not approve the question being asked. *The*
" *Juror.* I thank you, my Lord, but Lord Brougham——. *The Learned*
" *Judge.* Pray, sir, apply your mind to the discharge of your duty.
" The jury then turned round in the box, and in a few moments
" returned a verdict of *Guilty of the whole charge.*" I merely quote that as another particular instance of the well known fact that oftentimes these difficulties arise, and we have reason to believe that they would not arise if the penalty was not capital.

1330. (*Lord Stanley.*) Can you mention instances of the effect of capital penalties, in particular, exciting numerous public efforts to arrest execution after sentence has been pronounced ?—Yes ; I will not go into the particulars, but will merely refer to a few recent well known instances. There were the cases of Samuel Wright in Southwark

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in 1864, the case of Hall at Birmingham in 1864, the case of Jessie Maclachlan at Glasgow a few years ago, and the case of Gardner, which I have previously alluded to.

1331. Can you quote instances showing that the want of uniformity which now exists in the execution of capital sentences tends to encourage interference of the kind which you have mentioned?—Yes; I will first refer to the case of George Vass at Newcastle on Tyne, who was executed in 1863; he was executed for murder and rape committed in a state of drunkenness; it was a very bad case. Of course drunkenness is no plea in the eye of the law. I will compare that case with another case of murder, which took place at Marylebone and which was tried at the Central Criminal Court in 1862, namely, the case of Henry Quail and three others, who murdered a respectable tradesman, Mr. Wincott, without any cause of provocation. The jury brought in a verdict of guilty of manslaughter, Quail who gave the fatal stab received a sentence of six years penal servitude, and the others three months each, yet the Chief Baron in summing up had clearly identified "Quail's case with murder, and had warned the jury not to import into "their deliberations circumstances which could be entertained by the "executive alone." I contend that that is an instance of decided irregularity.

1332. (*Mr. Bright.*) That is a case where the jury took the matter into their own hands in point of fact?—Yes; but the plea in that case was drunkenness, the prisoners were all drunk at the time. If in the one case the man ought to have been hanged, so should he have been in the other, or they should both have been let off on a verdict of manslaughter. I will now give another comparison; I will compare the verdict of manslaughter in the case of Jordan and Craddock at Bedford in 1863, with the sentence to death and execution of the Spanish sailor, Alvarez, at Liverpool, in 1863.

1333. (*Mr. Neate.*) By "irregularities" you mean inconsistencies?—Yes. At the Norfolk Summer Assizes, 1863, Robert Jordan and William Craddock were charged with the wilful murder of Mr. Budd, solicitor, at Bedford. He, returning with his wife from a visit, was set on, without any provocation, by the prisoners and another. He died soon after. The jury brought in a verdict of manslaughter, and they were sentenced to seven years' imprisonment. I compare with that the case of the Spanish sailor Alvarez, who last year, at Liverpool, in a drunken brawl in the streets stabbed another man. He was sentenced to death and was executed. I contend that that is irregularity. I will take another remarkable comparison. At the Central Criminal Court, on October the 31st, 1857, Robert Thomas Davies, a carpenter, was indicted for the murder of his wife, Martha Davies, on the 6th of October. He cut her throat with a razor whilst drunk. There was no provocation. They had spent the evening together at a public-house. The verdict was "guilty." "The prisoner, being asked why sentence of death should not be passed upon him, replied, 'I "'loved my wife and child too dearly to deprive either of them of life, "'but my senses were destroyed by the liquor I had taken. I loved "'her too well to hurt a hair of her head if I had been in my senses.'" He was executed on November the 16th, 1857.

1334. (*Mr. Ewart.*) You think that in some cases people are executed although they were drunk when they committed the crime, and that some are let off?—Yes.

1335. (*Mr. Neate.*) In the Judicial Statistics it is said, "a sudden "paroxysm of drunken jealousy"?—I am not quite certain about the jealousy. I was going to compare this case with the case of Andrew

O'Brien. Andrew O'Brien, of Liverpool, in 1857, beat to death his mother-in-law, Mrs. Molyneux, whilst he was under the influence of drink. "He was tried on a charge of murder at the Winter Assizes; "but it was clearly proved that the wretched man was so habitual a "drunkard that he had become constantly excited, and that on the "day in question his normal state of delirium had been aggravated to "frenzy by drink. He was, therefore, acquitted on the ground of "insanity, and was ordered to be detained during Her Majesty's "pleasure." But if in the one case drinking and the frenzied state brought on in consequence, was an excuse, I contend that it was in the other also. As a concluding instance of the great incongruity in the commutations which take place, I will refer to the case of Elizabeth Ann Harris, who was tried at the Central Criminal Court on the 9th April 1856, for the murder of her two children at Uxbridge, one of whom was five years old. The next day at the Central Criminal Court was tried Celestina Sommer for the murder of her child ten years old. In both those cases the sentence was commuted, to the great disgust of many. The Annual Register for 1856 says, "The murder of her two children "by Elizabeth Harris, a double murder, presents no one feature which "can suggest that her sentence exceeded the requirements of justice, "and the slaughter of her child by Celestina Sommer ranks as one of "the most deliberate and cruel murders ever recorded. The dissatis-"faction long felt by the public at the uncertainty of the sentences of "the Courts of Justice, and the still greater uncertainty whether the "sentences passed would be really inflicted, was greatly raised. It "was felt that this indecision had reduced our judicial punishments "to a lottery, in which the criminal who drew a bad ticket was very "unlucky indeed."

1336. (*Lord Stanley.*) Can you give any reasons and facts tending to show that the abolition of Capital Punishment is necessary, in order to prevent collisions between the highest legal and medical authorities, such as are now frequent in a certain class of murder trials?—Yes. I will not presume to give any opinion on medical science myself, but will confine myself to the simple facts and to the opinions briefly expressed by several medical men. I will first quote from the "Lancet." I will be as brief as possible. At the annual meeting of the Association of Medical Officers of Asylums and Hospitals for the Insane, held at the Royal College of Physicians, July 14th, 1864, a unanimous resolution was passed to the following effect:—"That so much "of the legal test of the mental condition of an alleged criminal lunatic "as renders him a responsible agent, because he knows the difference "between right and wrong, is inconsistent with the fact, well known "to every member of this meeting, that the power of distinguishing "between right and wrong exists very frequently among those who "are undoubtedly insane, and is often associated with dangerous and "uncontrollable delusions." Now I will put a case in point. At the York Assizes on December the 16th, 1858, James Atkinson was tried for the murder of his sweetheart, Mary Jane Scaife, by cutting her throat. The prisoner put in a paper, stating, "The reason I murdered "her was because she would not have me." There was a reason, and a knowledge of it. He was acquitted as insane, yet he had acted as an overlooker of the work-people at a spinning mill at Darley. The jury took four hours in deliberating on the subject. Some letters which he had written from York Castle showed more apprehension than the medical men who were called for his defence would have given him credit for. I submit, in quoting that instance, that it shows that there are cases in which in courts it has been recognized that men were

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insane, although, according to the legal definition, they were responsible. They knew the nature of the act, and they were able to draw an inference, as I have heard it put by an eminent authority.

1337. (*Mr. Bright.*) In that case the verdict of the jury was in the teeth of the definition of the Judge?—Yes; of the law.

1338. (*Lord Stanley.*) In what manner do you contend that the inconvenience arising from the difference of view generally entertained on the subject of insanity between the legal and the medical profession would be diminished by the abolition of Capital Punishment?—Because it would not be felt that it was doing an absolute injustice, either to the person whose insanity was suspected or to society, to shut him up either in an asylum or a prison; certainly he ought never to be turned loose again upon the public. But it is felt to be a very great injustice to take away life under any circumstances where there is good reason for believing that there does not exist moral responsibility and the power of self-control.

1339. You would contend, I presume, that if Capital Punishment were done away with, penal servitude or imprisonment for life should be substituted, and necessarily that is a punishment which must be inflicted with a considerable degree of severity?—Without entering into the question of severity, I would say that permanent detention in some place or another should be the substitute.

1340. Am I to understand you to contend that, practically, it would make no difference as regards the position of the prisoner, whether he was detained as a lunatic or detained as a felon?—It would not make so much difference as to produce that constant and exceedingly inconvenient collision which is now becoming one of the greatest evils in our criminal trials.

1341. (*Mr. Bright.*) If a man was imprisoned, and if it was shown afterwards that he was insane, of course it would be a matter which the Home Office or anybody who had the authority in those cases would attend to, and on a proper report he would be removed to an asylum in the same way as any other person?—Yes; but the present system gives no security against that objection, where Capital Punishment is inflicted. Without going into the particulars, I will merely say in connexion with this matter, that it is the opinion of the most eminent medical men, as mentioned in the Manual of Psychological Medicine, by Drs. Bucknill and Tuke, at pages 382 to 407, that it is almost hopeless to expect that medical science will ever be able clearly to distinguish where insanity exists, and where it does not exist, and they give very decisive reasons for that absence of expectation.

1342. (*Mr. Waddington.*) Probably you have found in your researches several cases in which men have been convicted, by juries, who afterwards turned out to be perfectly insane?—Yes.

1343. There was the case of Burroughes?—I do not remember that case. In conclusion I would merely say, with reference to the particular case of Townley, that it affords one of the most remarkable instances of the impossibility of getting doctors to agree. We had three or four of the most eminent doctors on the one side, and three or four equally eminent doctors on the other, coming to opposite conclusions; but that would be a matter of indifference if Capital Punishment was abolished.

1344. (*Mr. Bright.*) If Capital Punishment had been abolished, you think that no doctors would have been called in?—Yes; or whichever way the decision had been given, there would not have been those extreme difficulties and anomalies.

1345. (*Lord Stanley.*) Can you adduce any facts making it pro-

bable in your belief that the common opinion as to the deterring effect of Capital Punishment is fallacious, at least under certain circumstances?—Yes; I believe that the punishment of death is the most deterrent punishment possible to a certain class of minds, provided it be inflicted with absolute certainty; but I submit that that is merely an imaginary and speculative condition, and that Capital Punishment never is, never has been, and we may reasonably conclude never will be, inflicted with absolute certainty. But on the other hand, I would also submit, that there is another class of crime which altogether precludes the idea of any efficacious deterrence at all. I allude to the large class of crime which is committed under the influence of overmastering passion, drunkenness, rage, or jealousy; there the argument of deterrence, which I admit in certain other cases, cannot apply at all.

1346. Is not that an argument, as far as that class of cases is concerned, not only against Capital Punishment, but against all punishment whatever, viewed as a deterrent?—As a deterrent I think it would be. With reference to some cases, showing that at any rate to a certain class of minds Capital Punishment is not deterrent, I will allude to the recent case of Müller. There sprang up in and around the metropolis, about the time of Müller's execution, what might be termed a crop of homicidal crimes. Müller was executed on November the 14th, 1864. On the same evening William Jessemer, an engineer, stabbed Leonard Blackburn, a blacksmith, in Berwick Street, London. Being presently arrested, at the station house the prisoner said, "I "stabbed him, and will do it again if he tells lies about me. I will be "hung for him, as Müller was for Briggs." Blackburn was thus severely wounded in the neck, and unable to leave the hospital, and in bed, next day. Again, there was another case. On Saturday November the 12th, two days before Müller's execution, but while it was of course universally known that he was awaiting execution, Elizabeth Burns attempted to cut the throat of her son, George Burns, aged two years, in Southwark, and did cut his throat. Before the magistrate, on the day of Müller's execution, she exclaimed, "Yes, I intended to "murder them all, as I wish to die." Mr. Woolrich, the police magistrate, said, "Why do you say that? *Prisoner.*—Because I am miserable "and want to die. I have been in such a trouble and worry, and the "sooner I am out of the way the better." Again in court she exclaimed, "I did it, and I meant to murder them all. I want to be "hung." There was another case. On the Wednesday before Müller's execution William Greenwood, a soldier, was charged with attempting to murder Margaret Sullivan, a prostitute, in Gray's Inn Road, London; she was stated in court by the policeman as being "not expected to "survive." The prisoner said to the policeman, "If you had not "come in I should have done for her. I will be hung for her. I "don't mind swinging with Müller for such a ——— as her." Again, on November the 5th 1864, a week after Müller's condemnation, Richard Havelan murdered John Gillespie with a poker, and severely beat another man, named Bailey, at Hatcham, near London, close to Peckam. That was a quarrel about beer. Gillespie had not offended the prisoner. Again, about the same time as Müller's execution, a horrible murder and decapitation took place at Plaistow, near London, in the interval between Müller's sentence and execution. A German, named Köhl, was charged with it. Again, a week after Müller's execution, a murder took place at Clerkenwell, and the prisoner has just been tried at the Central Criminal Court, and sentenced to penal servitude for life. This group is merely one instance; many cases could be given of such "crops" of murders

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springing up, in a remarkable manner, just at the particular time of executions in certain places.

1347. (*Mr. Ewart.*) You think that there are a certain class of crimes which are an incentive to crime?—Yes. I will just refer to one other striking instance which occurred last year. The youth Burton, at Chatham in 1863, murdered a harmless child, who had never offended him in any way, and immediately after the murder he surrendered himself to the police, exclaiming "I want to be hanged." He was hanged. A few weeks afterwards another murder was committed at Chatham, also upon a young unoffending child, by Alfred Holden; he likewise repeatedly expressed his wish to be hanged, and he too was hanged. In the same year, 1863, after those two executions, a third murder was perpetrated at Chatham. These murders were all about the same place.

1348. You think that the person who committed the crime must have been aware of the execution which had taken place before?—He most probably heard of it from its being in the same place. I cannot be legally certain of it. At Liverpool last year, at the Spring Assizes, two men were executed for the Ribchester murder, and at the following Assizes 11 persons were on trial for murder. I do not say that the whole of them were tried for murder at Liverpool; the crimes were committed in the county. Of these 11 persons five received sentence of death, four were convicted of manslaughter, one was acquitted, and one committed suicide in prison. Of the five condemned to death four were executed all for murders committed in the town of Liverpool; 100,000 persons are said to have been present at that execution. Three more murders were committed in Liverpool after that execution before the expiration of the year 1863.

1349. (*Mr. Bright.*) The execution was about August I suppose?—It was in the autumn. So I could refer to other cases; but I presume that it is not necessary to take up the time of the Commission by doing so. I will make one further allusion, as an example of the non-deterrent influence of Capital Punishment, namely, to the peculiar failure of Capital Punishment in the repression of regicidal crime, and in the case of regicidal crime it has been found that when punishments attended with less notoriety have been resorted to, there has been a marked decrease. It appears that during many years at the commencement of the reign of Louis Philippe, in France there was a regicidal mania. In the early part of that reign there was the usual course taken of trial and execution; but after that course was abandoned, and the offender was consigned to the obscurity of a private mad house, the regicidal epidemic, so termed, was stayed. I may just allude to the somewhat similar experience in England; there were several attempts to shoot Her Majesty, but when it was found that those who attempted to do so were treated as lunatics, and that the notoriety which attends a capital trial was taken away from them, there was a cessation of such attempts.

1350. (*Mr. Ewart.*) I think that you endeavoured to show in the former part of your evidence that in those countries where capital executions did not take place the crimes of murder had diminished?—Yes, more particularly in Belgium; I read the statistics from Belgium.

1351. (*Lord Stanley.*) Have you any further facts tending to show that the punishment of death has a peculiar tendency to create morbid feelings, and to encourage a desire for morbid notoriety?—Yes; we find that murderers or persons who either are about to suffer the punishment of death, or have just suffered the punishment of death, attract a

much larger amount of attention both in their immediate locality and in the country generally than any other class of criminals. It is comparatively seldom that we find other criminals set up in public effigy, or taken up with that absorbing interest which attends cases of murder. For instance last spring I was at Newcastle just after the execution of George Vass, and I saw in two of the principal thoroughfares in Newcastle, two wax-work effigies with an inscription in front "A "correct model of George Vass."

1352. (*Mr. Bright.*) And representations of the murders are occasionally seen are they not?—Yes, they are taken about in exhibitions.

1353. (*Lord Stanley.*) In that case do you think that the execution, or the murder attracts the most public attention?—I submit it as my opinion that where there is no probability of execution following even in murder, or in cases of manslaughter which is the nearest approach to it, we do not find that degree of interest excited.

1354. (*Mr. Bright.*) Is it not the fact that cases of forgery which come before the Courts excite infinitely less public interest now than they did in the days when forgery was punished with death?—I think so; I am glad that his Lordship has just asked me the particular question, with reference to whether it is the murder or the execution which attracts the most public interest, for it so happens that I can give a definite reply with regard to a fact on that point. After the commission of Müller's crime, when there was much talk about his probable execution, a printer's apprentice, named Bartlett, in Chancery Lane in London, committed suicide under the following circumstances: "It appears that "the boy's mind had engaged itself less with Müller's guilt than with "his assumed destination to the gallows; he had endeavoured to form "for himself a vivid impression of the sensation of hanging, and "though a lad of cheerful disposition, had even allowed his intellec-"tual enthusiasm to carry him so far as to express a wish to be hanged "himself. He then instituted a series of experiments with a rope "attached to a ventilator in the office, and his foot slipping on some "glass inlaid into the floor to light the room below he inadvertently "fulfilled, last Monday (12th September) night, his own rash wish." I submit that that was a case in which the idea of the execution was more in his mind than the murder.

1355. (*Lord Stanley.*) That was a case, as I gather from what you say, of an accidental death caused by a boy playing at hanging?—Yes.

1356. (*Mr. Waddington.*) There have been frequent instances of that?—It has been very frequent.

1357. (*Mr. Neate.*) You would hardly quote that as an instance of the effect of capital executions upon sane parties?—A well-known lawyer was remarking to me lately that it was within his own experience (and I am sure that it is within the experience of many of us) to have heard remarks made, with reference to Müller's case in particular, which showed the exceedingly undesirable amount of attention and minute dwelling on, which such cases occasioned, particularly in the minds of the female population of our country; and we must admit that going so thoroughly into the details of these capital cases tends to have an injurious effect upon the morality of the country.

1358. (*Mr. Ewart.*) Is not Müller's photograph circulated all over the country, and in private society?—To an enormous extent.

1359. (*Lord Stanley.*) Have you any other observation which you wish to make before closing your evidence upon the subject of Capital Punishment?—Yes. Independently of Christian mercy, common justice appears to forbid a punishment which practically does not make allowance for the usual antecedents and disadvantages of our criminals,

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by punishing them to the very utmost and cutting them off from opportunities of instruction and reformation. I will here refer to an extract from the Judicial Statistics for 1863, which shows that 90 per cent. of our criminal population are deprived of opportunities of education, without any fault of their own we may presume in a number of cases, by the unfortunate circumstances of their birth and of their hereditary privations; that they have been deprived of that knowledge and instruction and parental care, which we may say are essential to make a man a good man; and I most respectfully submit that it is not true justice for any punishment so far to refuse to take cognizance of those unfortunate circumstances, and antecedents of our criminal population, as, on their committing such violent crimes, at once to inflict upon them the utmost possible punishment without giving them any further opportunity of reformation, or endeavouring to make amends for that which is simply an unfortunate privation. It appears from the Judicial Statistics that more than 34 per cent. of the criminals committed during the year 1863 could neither read nor write; that more than 60 per cent. could only read, or read and write imperfectly; that only 3 per cent. could read and write well; less than 1 per cent. only are recorded as having had a superior instruction; and with regard to less than 1 per cent. their instruction was not ascertained. So that considerably more than 90 per cent. of our criminal population are here shown either to be absolutely incapable of reading or writing, or else only to have those attainments in a very imperfect degree; and I do most respectfully submit that that itself is a claim upon true justice, taking justice in the sense of making allowance for the real facts of the case, and that that in itself is an argument against Capital Punishment, especially as we have seen from the documents which I have read, and by general experience and testimony, that there have been many instances in which such unfortunate criminals, by being permanently detained instead of being executed, have reformed, or at any rate have had an opportunity for making their peace with God.

1360. In the case of the substitution of penal servitude for Capital Punishment, do you contemplate their release after a certain time?—I myself do not think that any man who has committed a murder should be turned loose upon society again. I would not, on the other hand, go so far as to inflict the most severe punishment possible. I think that our object should be the protection of society.

1361. (*Mr. Bright.*) Even if Capital Punishment was abolished, and even if you had two degrees of murder, and if the highest degree of punishment was imprisonment, still, in these cases of murder which were of the highest degree, would there not be great differences of circumstances and of guilt?—Yes; and I think that in such cases there should be some discrimination in the punishment. When I advocate permanent detention, I only refer to atrocious crimes like those of Palmer,—cold-blooded, deliberate murder, such as by poison. In such cases I think that the criminal ought never again to be liberated upon society.

1362. (*Mr. Waddington.*) Do you think it possible for the Legislature to take notice of the previous education or antecedents of a man? Must not that be left to the Executive?—I think that so long as it is done, it matters little whether it is done by the Legislature or by the Executive; but I respectfully submit that it ought to be done by one or the other.

1363. Do you conceive it possible to frame an Act of Parliament so as to punish an educated man more than an uneducated man?—De-

cidedly not; but I think that the whole case would be met by detention instead of execution.

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1364. (*Mr. Bright.*) Your argument is, that there are no first, second, and third degrees in hanging; that it is one punishment, and that the heaviest; and that no distinction can be made in it?—Yes.

1365. And you think that considering the differing circumstances of those who come under the action of the law, that is a circumstance of great harshness and injustice, speaking of injustice in its widest sense?—Yes.

1366. (*Mr. Neate.*) Your meaning is that which Mr. Bright has just pointed out; and also that, looking to the next class of offences, you find a very wide discretion allowed to the Judge, as between penal servitude for life and penal servitude for years?—Yes. But there are cases, for instance, there is the case of Wright, of Southwark, which I think come under the class of cases that I have been alluding to. And if it had not been for the most extraordinary efforts, Hall, of Birmingham, would have come within the list of cases to which I allude. As a further confirmation of the statement which I have made, that the majority of our criminal population have had antecedents which claim our commiseration, here is a statement taken again from the Judicial Statistics for 1863, showing that considerably more than 90 per cent. of our criminal population, as to their occupation, belong to the lower classes, that is to say, to the classes below the upper and middle classes. It appears that of our criminals for 1863, those who had no occupation were 17 per cent.; domestic servants, 3 per cent.; labourers, charwomen, and needlewomen, 46 per cent.; factory workers, 5 per cent.; mechanics and skilled workers, 18 per cent.; foremen and overlookers of labour, 0·1 per cent.; shopmen, shopwomen, clerks, &c., 1 per cent.; shopkeepers and dealers 3 per cent.; professional employments 0·2 per cent.; sailors, mariners, and soldiers, 3 per cent.; occupations not ascertained, 0·7 per cent. So that under all the heads of shopkeepers, and dealers, and professional employments, including under that head, I presume, all persons engaged in any profession, there are absolutely less than 5 per cent. of our criminal population.

I would now respectfully submit to the Commission whether it would not be appropriate for me, as yesterday you examined the Ordinary of Newgate, to conclude my evidence by extracts from two letters written by Dr. Forde, a former Ordinary of Newgate, and quoted by Basil Montague. I submit that it has a strong bearing upon our case, for he speaks from his practical experience. It is not the expression of a mere opinion, but it is the experience of an Ordinary of Newgate under what would be called the old thorough-going hanging days. The following is extracted from a letter written in 1811 by Dr. Forde, and quoted by Basil Montague in his work on the "Punishment of Death," vol. iii. p. 113:—"The chief cause of the committing of crimes is to be ascribed, "in my humble opinion, to the want of early instruction in reading, "consequently a total ignorance of religion, as well as of every moral "principle." "You cannot expect these people to practice what they "do not know." I have then extracts from another letter by Dr. Forde, written in the year 1783, in answer to an application made by Mr. Bentham, and quoted by Basil Montague, vol. ii. p. 187. Speaking of his attendance at the Newgate executions, Dr. Forde states:—"From everything I have witnessed on these melancholy occasions, I "am decidedly clear that executions, managed as they are at present, "answer no end whatsoever, either for punishment or example." The Doctor concludes by letter with saying:—"In short, when the criminal "is dead, both the crime and the punishment are soon forgotten. Let

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" him live and labour, and the public may benefit by his example, " whilst he himself is making some atonement for his crimes by his " industry, and humbly endeavouring to make his peace with God. I " have often reflected, and as often wondered, with what small degree " of devotion or right frame of mind certain persons have joined in the " second prayer in our Church Service :—'Almighty God, who desirest " 'not the death of a sinner, but rather that he may turn from his " 'wickedness and live.' Strange it is that our religion is so mild, and " our laws are so sanguinary! Instead of sparing the life of a criminal, " in order that he may turn from his wickedness and try to live for " ever, our criminal code nips him in the first bud of his sin, cutting off " all hope of reformation and destroying the possibility of atonement to " the injured party. I hear some one say, What is to be done, then, " with criminals? Would you execute none? *None.* Square the " punishment to the several degrees of transgression, and plead the " mild laws of God in your favour."

The witness withdrew.

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1367. (*Chairman.*) I believe that you have given the subject of Capital Punishment some consideration?—I have.

1368. What has been the result of the attention which you have given to the subject?—The conclusion at which I have arrived is that Capital Punishment ought to be abolished.

1369. May I ask you to state to the Commission what are the grounds upon which you would recommend it to be abolished?—The general view which I take of the subject is this. There are certain peculiar objections to Capital Punishment considered in itself — considered apart from all question of its effect upon crime. Those objections appear to me to be of such very great importance that, unless it could be shown that in all probability Capital Punishment had a very decided and marked superiority over secondary punishment, considered as a deterrent from crime, it ought not to be retained. Now, I think that this cannot be shown. On the contrary, it seems to me that there is some reason to believe that by the substitution of secondary punishment for Capital Punishment, there might possibly be a gain of deterrent force, and that certainly there would be no considerable loss of it. That is the general view which I take of the subject. Then I have to explain the objections to which it seems to me that the punishment is liable, and also to state the reasons for my opinion as to the comparative preventive power of the two kinds of punishment. I have four great objections to Capital Punishment, one of which is rather of secondary importance, but still of importance. The first is the objection from the sacredness of life. I am not one of those who consider that society has no right to take away human life. I think that there are circumstances under which a regard to its own security and welfare justify it in doing so; but I consider that the extinction of human life is an expedient for protecting society to which there are peculiar objections, objections different not only in degree but in kind to those which lie against other modes of effecting the same object. I consider Capital Punishment a greater evil than secondary punishment, not only because it is more severe, but because it is altogether of a different and more serious character. The only limit to the right of society to inflict secondary punishment is a regard to humanity; the ground for hesitation before inflicting death is of another and much graver kind. Death

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is a punishment which there is a right to inflict, but the infliction of which is an evil standing apart and isolated from all others in magnitude and importance. To deprive a man of liberty, property, or comfort (which is all that is done by secondary punishment), is one thing, to take away his life is quite another. In taking away life, you are not only increasing the severity of the penalty,—you are adding enormously to the evil of punishment by importing into it an entirely new element. That is the first of the principal objections which I take to the punishment of death. The second is that it is alone of all punishments irrevocable and irreparable. You may say that secondary punishment is irrevocable, because it is only a part of it which can be revoked when any part has been inflicted ; but Capital Punishment is both irrevocable and irreparable. This quality of Capital Punishment, combined with the fallibility of legal tribunals, I think is an evil of the very greatest importance. It seems quite clear, without looking to the facts of the case as they have actually happened, that an innocent person must occasionally be convicted.

1370. Do you draw any distinction between being convicted and being executed ?—I am now speaking of the irreparability of Capital Punishment, and I argue that innocent persons must frequently be convicted. I should also say that it is quite possible that an innocent person may occasionally be executed.

1371. (*Mr. Waddington.*) Your argument that it would be irremediable would only apply to the case of an execution ?—Yes ; but a man must first be convicted before he can be executed.

1372. (*Chairman.*) But a man is not always executed because he is convicted ?—No. I intended to say that there is an absolute certainty that in the course of time, and in a sufficient number of instances, there must occur a case of an innocent man being hanged. That to my mind is a very terrible thing, and the objection you may say is cumulative, because to deprive a man of life is the greatest evil which you can possibly inflict upon him. This kind of punishment involves a greater evil than any other ; and it is this very punishment which involves the greatest evil which alone is irreparable. I think that the objection has a cumulative force ;—it is a double objection rather than a single one. The next objection is what I may call the "invariability" of Capital Punishment ; that is to say, that crimes classed as murder involve very various degrees of guilt, and yet they are all visited with the same penalty. Perhaps the crimes classed as murder have more variety in degrees of guilt than almost any other crime which you can mention. For instance, if you take the extremes, you may compare the crime of infanticide, or of the murder of a wife by the husband for unfaithfulness, with such crimes as those of Palmer or Rush ; if you punish the one with death, it seems to me that you ought to punish the other with something entirely different. And between these two extremes there is an immense variety of degree. Under a system of secondary punishments, you can divide punishments and crimes into corresponding classes, and you can graduate the punishment according to the crime with considerable nicety, the Judge having the power to pass sentence with a great latitude as to the particular amount of punishment ; you cannot graduate death, that is clear.

1373. (*Mr. Waddington.*) That observation applies to cases of manslaughter, in which that graduation is very frequently acted upon ?—Just so ; it applies to manslaughter, and, I think, to almost all other offences.

1374. I mention manslaughter because it is a case of depriving a person of life ?—Quite so. I think that this objection is of very great

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force. I am speaking of Capital Punishment as now administered in this country. There might be some changes which would modify that objection, but they could not possibly remove it altogether.

1375. (*Chairman.*) One ground upon which I understand you to object to the infliction of Capital Punishment is, what you consider to be the sacredness of human life?—Yes; that is the first ground which I mentioned.

1376. Do you consider the life of a murderer more sacred than the life of the person whom he has murdered?—I am not saying that there are no objections to murder, I am merely endeavouring to explain the peculiar objections to Capital Punishment. I consider that with regard to the man who commits a murder and the person murdered, the sacredness of life is the same in both cases.

1377. You do not see any distinction?—I do not see how a distinction can be drawn.

1378. (*Mr. Waddington.*) I think that I have seen it put by some writers that society is following the example of the murderer solely for its own interest?—It has been put in that way; I am now merely considering the particular point of the objections to Capital Punishment, and if I can prove that these are great objections, and that they are peculiar objections, I shall have proved this part of my case. No doubt the sacredness of life is a thing which the murderer ought to consider before he commits the crime.

1379. (*Mr. Ewart.*) The disapprobation of Capital Punishment implies no approbation of murder?—Just so.

1380. (*Chairman.*) You state that you think that Capital Punishment ought to be abolished?—That is the conclusion to which I have come.

1381. And you think also that Capital Punishment is certainly more severe than secondary punishment?—Decidedly more severe when inflicted.

1382. Would you think it right to inflict the most severe punishment short of Capital Punishment in cases of murder?—I think so.

1383. Then may I ask whether you have considered what that secondary punishment should be?—I have always assumed that it would be possible to add to the severity of the greatest secondary punishment which is now inflicted in some way which should not be inconsistent with the rules of humanity; but I have not carefully considered what the particular expedients for increasing its severity should be; I should leave them rather to after consideration.

1384. Then what I gather from you is, that you wish Capital Punishment to be abolished, but that you have not considered what you would substitute in the place of it?—I would substitute a secondary punishment made more severe than the greatest secondary punishment now inflicted, if that could be done consistently with the recognized rules of humanity; in what degree or by what particular means the greatest secondary punishment now inflicted should be made more severe, I can hardly judge; it is more a question for inspectors of prisons and other persons conversant with the treatment of criminals.

1385. I gather from you that all you want is to see Capital Punishment abolished, but that you have not considered what you could substitute in its place?—I cannot admit that. I would substitute for it, as I have said, the highest secondary punishment now inflicted, made more severe.

1386. What secondary punishment, first of all, do you propose to substitute, and, in the next place, would it be possible to carry out that secondary punishment?—I think that even if it was found impos-

sible (which I cannot suppose it would be) to increase the severity of the highest secondary punishment now inflicted in the case of murder, still my case would not be disproved. It is strong enough to bear even that contingency. If it were impossible to increase the severity of the highest secondary punishment now inflicted, I should substitute the highest secondary punishment now inflicted.

1387. It has been put that that would be penal servitude for life or transportation for life?—Just so.

1388. It has also been suggested that it might be perfectly impossible in many instances to carry that out; for instance, that a man might be found guilty of murder and sentenced to penal servitude for life, but that in the course of 10 or 15 years, or in a certain time, his health might break down, and that if kept in that state his life might be forfeited. Would you then have to throw him loose upon society?—I should make no difference, in such a case as that, between a murderer and a person charged with a less crime. If it was absolutely necessary to release him on account of ill health, I should think that the reasons for releasing the prisoner in the one case would be the same as in the other.

1389. (*Mr. Ewart.*) Supposing that Capital Punishment was abolished, and that another punishment was substituted for it, which punishment was so severe that it threatened the life of the prisoner, but that you continued to keep him in prison, his life being in danger, and he died, that would, in fact, be an indirect application of Capital Punishment, and therefore, although professing to proceed on the principle of abolishing Capital Punishment, you would be administering such a punishment as endangered and ultimately took life?—No doubt to that extent it would be so.

1390. It would be indirectly sanctioning that which you think should be abolished?—Yes. I do not think that the difficulty which has been suggested is a serious one.

1391. (*Chairman.*) Will you proceed to your next point?—The fourth objection is what I call the objection from "secret jurisdiction," for want of a better term; the frequent reversal of the sentence by the Home Office, and those proceedings which amount, in fact, to a new trial without the ordinary safeguards, such as publicity, for the due administration of justice.

1392. (*Mr. Waddington.*) Is that more applicable to Capital Punishment than to any other punishment?—I think that in practice it is; not in theory but in practice. I have always understood so.

1393. It is not frequent in any case?—It is frequent in the case of murder, as appears when the number of executions is compared with that of convictions.

1394. By "reversals" do you mean commutations?—I mean a reversal of the sentence of a legal court.

1395. Commutations are very frequent, if you mean commutations?—Those are very frequent; "reversal" perhaps is not a correct expression.

1396. (*Lord Stanley.*) If a man is sentenced to death, and his sentence is commuted to penal servitude for life, that is, at the utmost, a modification and not a reversal of the sentence?—It is a disregard of the sentence; the deliberate sentence of a regularly constituted legal court is to a certain extent set aside.

1397. (*Mr. Waddington.*) Without reference to the frequency, I suppose you mean that there are objections to the commutation of Capital Punishment?—The evil to which I refer may not be so peculiar to Capital Punishment as I suppose; but I think that, as interfering

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with the regular course of justice, it is a great evil; it tends to bring law and justice into contempt, and to weaken the confidence of the public in Government altogether.

1398. (*Chairman.*) Then on this point am I to understand you to advocate that the sentence of the Judge once pronounced should be irrevocable?—I do not advocate that. I merely state that it appears to me that the frequent interference by the Home Office (and practically it is by the Home Office) with the sentences is an evil, and an evil inseparable from Capital Punishment.

1399. Supposing that Capital Punishment was abolished, would you then allow no appeal to the mercy of the Crown?—I think that an appeal is necessary, but I have always been under the impression that, owing to the pressure put upon the Home Office, and the general feeling respecting Capital Punishment, the prerogative of mercy was exercised on the advice of the Home Office very much more often in the case of capital sentences than in the case of any other sentences. Mr. Waddington, of course, is much better informed than I am upon that point.

1400. (*Mr. Waddington.*) I do not say that that is not so. I think that it is perfectly fair for you to put it so.—Then that is my meaning, that with regard to the exercise of the Royal prerogative, it is much oftener exercised in the case of Capital Punishment than in the case of secondary punishment.

1401. (*Chairman.*) But still I do not understand you to mean that there should be no appeal to the Crown for mercy after the sentence of the Judge is once pronounced?—Certainly not; but that prerogative of mercy is a power to be exercised exceptionally; and if it is exercised frequently (and, looking at the statistics on the subject, it seems to be exercised very frequently), it becomes an evil; if it becomes habitual it becomes an evil. I have no doubt that it is a very proper power to be lodged in the Crown, but in its very nature it must be exceptional. I wish it to be clearly understood that my objection is to Capital Punishment as necessitating an unusually frequent exercise of the Royal prerogative of mercy, which involves a new and secret trial, and the setting aside to a certain extent of the deliberate sentence of a law court, thus weakening the public confidence in the due administration of justice.

1402. Do you object to the manner in which the Royal prerogative is now exercised?—So far as my own consideration of the subject goes, I am not prepared to say that it could be exercised in any other way. At all events, I have not considered that point.

1403. Then I may fairly assume that you do not object to it?—My objection is to Capital Punishment as involving a very frequent exercise of the prerogative.

1404. But you do not object to the manner in which the Royal prerogative of mercy is carried out, because I understood you to say that you have not considered the question?—I think that the prerogative of mercy is a power which it is very right should be lodged in the Crown, but, owing to the feeling in this country upon the subject of Capital Punishment, it seems to work badly in this particular case. It is a very bad thing that there should constantly be a secret trial going on, and persons corresponding with the Home Office, and a criticism of the sentence, and if not a reversal, yet a commutation, that is to say, an alteration of a deliberate sentence of a court of law.

1405. (*Mr. Bright.*) Apart from the question of that machinery, is it not one of the inevitable results of Capital Punishment that there

often must be that questioning of the verdict, and often of the sentence; can you escape that?—It is impossible.

1406. That is inseparable from the nature of the punishment?—Yes.

1407. And from the feelings of men with regard to the taking of life?—Yes, owing to the feeling entertained in this country upon the subject of Capital Punishment.

1408. (*Chairman.*) Do you mean that the exercise of the Royal prerogative of mercy is inseparable from Capital Punishment?—No, I do not mean that.

1409. (*Mr. Waddington.*) Do you not happen to know that the prerogative exists in almost every other country, and is more frequently exercised than it is in England?—I have no doubt that a corresponding power exists in other countries. I know nothing as to the frequency of its exercise.

1410. With respect to the frequent applications to the Home Office in England, you have already stated that the punishment of death under the present law is applied to offences of varying degrees of atrocity?—Certainly.

1411. Is it not, as regards the offences of minor atrocity, that the applications are almost invariably made?—I should suppose so. I have no doubt that it is so.

1412. You do not, perhaps, happen to know that there are a great many cases in which no pressure at all is put upon the Secretary of State?—I quite understand that.

1413. Therefore, if the law with regard to murder were to be altered to this extent, that a distinction was made between the cases of great atrocity and the cases in which the public now feel sympathy with the offender, that pressure upon the Home Office would be very much diminished?—Certainly it would be diminished. I will not say "very much," but it would be diminished.

1414. (*Chairman.*) That would more or less meet your view, namely, a classification of murder?—Yes. It would to my mind be of less importance than at first sight might be supposed; but it would do something. I think that it would be an improvement.

1415. What is your next point?—My remaining objection, though it is important, is not of so great importance as the others, and is moreover one to which Capital Punishment is not necessarily liable, and that is, the scandal of public executions, which is involved in the present system of Capital Punishment in this country. I think that that is a very great evil in many ways. I think that the evil is not much exaggerated, so far as it goes. It is an evil of minor importance to the others, but that those scenes should occur seems a disgrace to our social arrangements. And if publicity of executions cannot be dispensed with in this country, that is in itself one reason (though a less weighty reason) against the retention of Capital Punishment.

1416. Have you any other point to mention?—I have now explained the principal objections which I take to Capital Punishment. From those objections secondary punishment is free. My next point is as to the question of deterrent force, and my argument is that, there being these great objections to Capital Punishment, unless it can be shown that in point of deterrent force it has a very considerable superiority over any secondary punishment, it ought not to be retained. So that I have now to consider what is the comparative deterrent power. I think then that death *cæteris paribus* is a stronger deterrent than any secondary punishment which you can inflict in these days, and therefore, if Capital Punishment were enforced with the same rigour as

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secondary punishment, I think it would act as a more powerful preventive of crime.

1417. (*Lord Stanley.*) You mean that if it were possible, consistently with humanity, to execute every offender capitally convicted, it would, as far as mere terror goes, produce a greater effect than any secondary punishment ?—Certainly, I think it would; but the case is very far from being so.

1418. (*Mr. Bright.*) Would you not say with regard to that point that in past times, when sentences were carried out with very much more rigour, not only for the offence of murder, but for other offences, that deterrent power failed, and that one of the grounds upon which the change was made was that it had failed ?—Yes, for minor crimes ; but I should say that it failed principally because the punishment was so utterly disproportioned to the crime that public opinion was much more against Capital Punishment in those cases even than it is against Capital Punishment for murder ; those crimes were much inferior in moral guilt.

1419. (*Mr. Ewart.*) Do you think that if there were more invariable executions than there have been in this country crime would be diminished by it ?—I should be inclined to think that, if inflicted with anything like certainty, death would have a greater effect in deterring from crime than any secondary punishment ; but I cannot speak with any confidence upon such a question.

1420. It is well known that in Tuscany Capital Punishment was abolished, and that in the Roman States it was imposed ; has it come to your knowledge that there have been many more murders in the Roman States than in the Tuscan States ?—Yes, I have no doubt that there are, from what I have heard.

1421. (*Chairman.*) Will you proceed with your statement ?—If the Commission will allow me, I will here read an extract from a pamphlet which I published some few years ago on this subject. On the question of comparative deterrent force, which is now the point at issue, I say, "We have to inquire what is the degree of expectation "set before the murderer that he will suffer death, as compared with "that of other offenders that they will undergo the particular penal "inflictions assigned to their offences ? An answer to this question "sufficiently approximating to the truth may be obtained from the "published official returns." I have taken the returns up to the present time. "We find that in the six years 1857-1862, 396 persons "were committed for trial for murder in England and Wales, and that "of these 126 were convicted and sentenced to death, and 76 were "executed. Hence it appears that the proportion of committals to "convictions for murder is about 3 to 1, that of convictions to exe-"cutions about 12 to 7, and that of committals to executions about "5 to 1. Comparing with this the prospect of escape from other "punishments, we find that in the same six years the total number of "persons committed or bailed for offences other than murder was "108,728, and of persons convicted and sentenced for such offences "82,132, while the number of such persons who though convicted and "sentenced were unpunished is not stated in the returns, and is "certainly so small as to be of no importance in the argument. The "total number, therefore, of committals for these last-named offences "was to the total number of punishments for them as (speaking "approximately) 4 to 3. We have here, then, a proportion between "committals and punishments of, in the case of murder, 5 to 1 (*i.e.*, "15 to 3), and, in the case of other offences, of 4 to 3 ; that is to say, "on the part of a person committed for trial, the degree of expectation

" of a secondary punishment is to the degree of expectation of the " punishment of death as 15 to 4, or $3\frac{3}{4}$ to 1." Those are the figures which I obtained from the Judical Statistics which were published. Then I say, "Assuming that the proportion of committals to actual " crimes is not materially different in the two cases, this result may " be taken as indicating sufficiently for the present purpose the degree " of expectation which is offered to criminals of capital as compared " with secondary punishment. And this expectation being such as has " been shown, it can hardly be doubted that, if the alternative presented " to the murderer were absolute impunity; or, in other words, supposing " that, in the actual state of the case, by escaping death he escaped " punishment altogether, some kind of secondary infliction is possible " which would be at least as efficacious as that of death for the pre- " vention of the crime. The increase in the expectation of the punish- " ment would on that supposition be so great as in all probability fully to " compensate for its inferior severity. But the actual state of the case " is not that supposed. Instances in which murderers escape execution, " owing to the reluctance of juries and the Government to enforce the " law, are indeed extremely frequent; but of those who are reprieved by " the Secretary of State, a large proportion are punished in some other " manner, usually by penal servitude for life. Of those, again, whose " lives are preserved by the humanity of juries, there are many who " are found guilty of manslaughter and sent to penal servitude for life, " or of long duration. Those detected murderers who go altogether " unpunished for the most part belong to that class whose crime cannot " by any ingenuity be construed into manslaughter or who can with any " pretence of reason be treated as insane. Thus the actual position of " the detected murderer, as regards the prospect of punishment, is as fol- " lows:—There is a possibility, the value of which it has been attempted " to estimate, that he will be executed; if he escape execution, there is " a probability that he will be consigned to penal servitude for life; " and there is a not inconsiderable chance that his crime may be " followed by entire impunity. Such being the nature and amount of " the deterrent motive which is now offered by the law as against the " crime of murder, the question is whether a secondary punishment is " not possible which would supply a deterrent motive of equal or " greater strength. Suppose, for instance, that penal servitude for life, " not as at present practically remissible after a certain term of years, " but from which under no circumstances or conditions would it be " possible to obtain release, and increased in severity and impressiveness " by various expedients, as for instance by additional seclusion and " additional labour, were in future to be the penalty for murder. " The consequence would be that murderers who under the present " system would be executed as well as those who are now, owing to " the general reluctance to inflict death, sent to penal servitude for " life, or for a long period, and those who for the same reason escape " altogether, would in future be punished with the new and aggravated " form of penal servitude. The *loss*, therefore of deterrent force would " consist in the substitution of a milder punishment for that of death " as regards those murderers who would now be executed, and who, " it has been seen, are comparatively few. The *gain* in the same " respect would consist in the increased severity of the suffering " which would be undergone by those murderers who are now from " motives of humanity condemned to penal servitude, and in the ex- " tinction of the possibility, which from the same cause at present exists, " of complete impunity. To put the case somewhat differently; " instead of a chance of being put to death so small that there is only

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" one execution to five committals, and an expectation either of complete " impunity, or of a punishment no more severe than that awarded to " manslaughter, there would be set before the detected murderer " something like a certainty of as heavy a punishment short of death " as could be inflicted consistently with the recognized rules of " humanity. It seems very questionable, therefore, whether in point " of efficacy the gain on the side of the new law would not at least " counterbalance the loss, or, in other words, far from improbable that its " effect might be, if not to diminish, at all events not to increase crime. " This, however, may it would appear, be confidently looked upon " as in the highest degree probable, that any sacrifice of preventive " power which the measure might involve would not be large. Very " possibly no increase whatever, or even a diminution of crime, in " all probability no great or alarming increase of it, would be the " result of the change." That is confirmed *pro tanto* by the experience of foreign countries. In many foreign countries Capital Punishment has been abolished, and we hear of no mischief which has resulted from it and of no increase of crime; and although that argument is not conclusive, it is of considerable importance.

1422. (*Lord Stanley.*) Is there any state of considerable extent in Europe which has abolished Capital Punishment?—Russia has abolished it.

1423. (*Chairman.*) Is there any further statement which you wish to make to the Commission?—That then is my case against Capital Punishment. The peculiar objections to it are, I consider, immensely strong; they will strike different minds with different degrees of force, but I consider them to be of extreme importance; and at the same time I have endeavoured to show that there is a very great probability that you would lose nothing in point of prevention of crime by a resort to a secondary punishment in place of Capital Punishment. These two considerations—on the one hand, the peculiar evils incidental to this kind of punishment, and on the other, the absence from it of any superiority in point of deterrent power—appear to me, taken together, to be conclusive.

1424. You do not think that there are at present convicts of great determination who are restrained from committing murder because they know that there is a chance of their being hanged if they do?—I have no doubt that there have been many who have been so restrained.

1425. And that there are at present?—Yes; there is no doubt that there are many.

1426. (*Mr. Waddington.*) In the case of a convict in a prison, there would not be that uncertainty of which you have been speaking; it is principally in the case of secret murders which are to be proved by circumstantial evidence that the juries are extremely unwilling to convict?—Yes; that makes a great difference.

1427. In the case of a convict who murdered his warder in the prison, there would be no doubt whatever, and his conviction would be almost certain. In such a case as that have you any doubt that the fear of death is a very strong deterrent indeed, would it not also be the only deterrent. Supposing that a convict were under sentence of penal servitude for life which was to be inexorably carried out, could there be any other deterrent except the fear of Capital Punishment?—You might increase the severity of his secondary punishment.

1428. How can you do that when by the hypothesis the penal servitude for life is to be of a very severe character indeed, more severe than at present?—Are you supposing the case of a murderer?

1429. Yes?—It may be the case that a murderer in prison, waiting for execution, might murder a warder, and become a double murderer.

1430. (*Mr. Neate.*) When you talk of the severity of the secondary punishment which you would substitute in cases of murder, you do not mean that it is to be a punishment so severe as not to admit of temporary aggravation?—Not at all.

1431. (*Lord Stanley.*) As a matter of humanity do you think that it is much more humane to make a man's life a burden to him for 20 years than to put an end to it?—On the score of humanity there may be some doubt. But on the whole there are, in my opinion, stronger objections to the punishment of death than to a secondary infliction such as that suggested.

1432. (*Mr. Waddington.*) Do you not think that juries may be almost equally unwilling to convict in a case where the punishment is an inexorable imprisonment, as they are now in cases where the punishment is death?—If the punishment was only an inexorable imprisonment for life, I think that the juries would be very willing to convict if the evidence was sufficient. I think juries in general would not hesitate to consign a man to that punishment.

1433. Do you not think that the horror of such a punishment as that might be so put by an able counsel as to be almost as alarming to a jury as the punishment of death?—I should not think so.

1434. Is not being without hope the very essence of the severest punishment which can be inflicted?—I should suppose that a part of the public are in the habit of imagining that many prisoners now undergo inexorable servitude.

1435. (*Mr. Neate.*) In the present case it is not so much the objection to the severity of the punishment as the fear of committing an irrevocable mistake?—I suppose that there is a little of both feelings.

1436. The excessive severity of the highest substituted punishment might lead juries in some cases to find verdicts of murder in the second degree, or of manslaughter instead of murder, but would not lead to verdicts of acquittal?—Probably that would be the case.

1437. (*Mr. Waddington.*) Is that so; have there not been cases of acquittal when the evidence was as clear as possible, upon the ground of a dislike to Capital Punishment?—Yes.

1438. Has not that feeling been acted upon in cases where the evidence was irresistibly clear?—Yes, undoubtedly it has been acted upon when the evidence was very strong, but I think that the evidence is never so strong but that a juror feels that there is a possibility of a mistake.

1439. (*Mr. Neate.*) In those cases in which the juries have abstained from giving verdicts of guilty upon the clearest evidence, it has been because they have thought that the circumstances of the crime ought not properly to be punished as murder, and they may have been told by the Judge that they must find a verdict either of murder or of nothing. Does not that arise from our defective classification of the crime of murder?—It often arises from that cause.

1440. (*Mr. Waddington.*) In fact is it not from the extreme clearness of the evidence in cases where the prisoners have been acquitted that the argument is derived that the jury have acquitted on the ground of their objection to the punishment of death; when the evidence was doubtful they would be bound to do it?—It is so, but the jury seem to me to have been in the habit of considering that the case is never so clear but that it is just possible that the accused may be innocent, and

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however strong the evidence is, I should say that that is one feeling of a jury which induces them to hesitate.

1441. Is it not the fact, that very generally indeed, in cases where the evidence is strong, juries now convict in cases of murder; we have been so informed by the Judges?—They very often convict, certainly.

1442. Do not they very generally do so; in other words, are not the cases which you mention, which undoubtedly exist, where a prisoner is acquitted although the evidence is clear, on account of the fear which the jury entertain of the punishment of death, very rare and exceptional cases?—I think that there are cases in which they acquit or find guilty of manslaughter from a repugnance to the punishment of death. And judging by the returns which I have quoted on the subject, it would appear that those cases are not rare.

His Lordship withdrew.

Adjourned.

Tuesday, 14th February 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
MR. JUSTICE O'HAGAN.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Right Hon. Sir G. Grey, Bart., M.P.
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The RIGHT HON. SIR GEORGE GREY, BART., M.P., examined.

1443. (*Chairman.*) You are Secretary of State for the Home Department?—Yes.

1444. How long have you been so?—I have held that office three several times, and, altogether, for nearly 12 years; but not consecutive years.

1445. You can speak, therefore, as to the effect of Capital Punishment?—I have had my attention necessarily very much directed to the subject; and I have often had to express an opinion upon it in the House of Commons.

1446. Will you give us your views upon the subject?—I think that it is the punishment which is most dreaded; and I have always thought, and still think, that it could not be safely dispensed with in cases of murder. I think that it is impossible to say with accuracy what the deterring effect of it may be; but looking at the dread with which Capital Punishment is regarded, I cannot help thinking that it must have a very deterring effect in many cases. There are, no doubt, many cases of murder (speaking of murder as it is now defined by law), in which reason has no influence over the passions, and in which men, without any regard to consequences, commit crimes; where the dread of the punishment for the crime has no effect at all; but in a great many other cases, which are cases where there is premeditation, and

which are in what is called the first class of murders, where a distinction between different kinds of murder exists by law in other countries, I think that the fear of death must have a very deterring effect. I find that it is not an increasing crime, but is diminishing progressively in proportion to the population.

1447. To what do you attribute that decrease?—The decrease is not a very great one; but it is a decrease. I should be disposed to attribute it, in a great measure, to the penalty attached to the commission of wilful and deliberate murder, which, I think, must deter many persons who are without any moral principle to control them, and who are actuated by the ordinary motives which influence people to commit robberies or other crimes. I think that the fear of death must deter them from going to the extreme length of taking away life in the accomplishment of their purposes.

1448. Then are you of opinion that the worst of the convict class are prevented from taking life by the fear of being hung for it?—I am not able to speak positively upon the subject, it is merely an opinion; but I should think that *à priori* it would be so, and I am inclined to think that it is so; and I am confirmed in that opinion by others who have had more opportunities than myself of really observing the effect on the minds of that class of persons.

1449. It has been stated that juries are unwilling to convict in cases of murder on account of a dread of the consequences of the verdict. Is that your opinion?—I think that that was probably the case, although I do not speak from my own experience, before the law was altered. Before I held the office which I now hold, it probably was the case; and I have no doubt that it existed to a great extent when the penalty of death attached to a great many other crimes than murder; and in a very few cases it may operate now; but within my experience, watching as I do the cases which occur, and reading the evidence carefully in almost all cases, I think that, as a general rule, juries find honest and conscientious verdicts, and are very much guided in the verdict which they find, as between murder and manslaughter, by the opinion of the presiding Judge. They frequently, I think, recommend to mercy. I have no means of knowing what passes in a jury-box, but that may possibly be in some cases (we can hardly account for it in any other way than upon that supposition) because there has been some difference of opinion among the jury, and unanimity has been obtained by a verdict of guilty, accompanied by a recommendation to mercy where there were really no grounds for that recommendation. The Judge frequently asks for the grounds of the recommendation, and the jury frequently give none, or some ground which has no bearing upon the case. In those cases, I think that that may account for the belief that there has been an indisposition to find a verdict which would necessarily consign the prisoner to execution.

1450. I suppose that in your experience it has come before you to look into the question of whether in these times within the last 30 years persons have been convicted, and even executed, who were innocent of the offence?—I do not remember in my time a single case in which, after conviction and execution, any reasonable doubt has ever been raised of the guilt of the person convicted; no subsequent fact has come to light, no subsequent evidence has been even suggested or tendered, which could throw a doubt, in my experience, on any case in which the sentence of the law has been carried into effect. There have no doubt been cases where the verdict has not been satisfactory to the Judge, and in those cases the judge invariably brings his view of the case under the notice of the Secretary of State. In other

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cases, in which the Judge may have been at first satisfied, doubts have arisen, and upon conference with the Judge the sentence has been commuted, but I do not remember in my experience any case in which the innocence of a man convicted of murder has been established.

1451. Then, in fact, it has not been established to your satisfaction that any man who was convicted was wholly innocent?—I do not remember in my time a single case (Mr. Waddington will correct me if I am wrong) in which a man convicted of murder received an absolute pardon. There was the case of Smethurst; but that was not decided by me. I speak only of the period when I have held the office which I now hold—I took the office in 1846, that is 19 years ago—and during 12 of those years, but not consecutive years, my attention has been officially, as a matter of duty, directed to these cases, and I have looked into them most carefully.

1452. (*Mr. Waddington.*) Are you speaking of cases of murder solely?—Yes. I understand the question to apply exclusively to cases of murder.

1453. (*Chairman.*) There is one class of murder which has been alluded to in the course of this enquiry which is commonly called infanticide,—have you any views upon that subject?—Infanticide is distinguishable from all other cases of murder in this respect, that since the year 1849 no woman has been executed for infanticide. The last execution took place in 1849—it was the case of a woman convicted in Wiltshire, before the late Mr. Justice Cresswell. He reported the case, and said that in passing sentence he had held out no hope of mercy, and that he did not think that I should receive any application on her behalf; judging, I presume, by public opinion with regard to the facts of the case. The jury had there recommended the prisoner to mercy, and on the judge asking the reason, it was answered that she might have time to repent, and the only application which I received in that case (I am looking back to papers—I do not speak from recollection, it being so long ago) was, that a letter was written in a few lines to know whether the recommendation of the jury would be attended to. In that case the woman was executed, and that was the last execution for infanticide. She was a married woman. She poisoned her own child, and there was great reason to believe she had poisoned several before. I suppose that that was the reason which in the neighbourhood led to an absence of all sympathy with her, and to the feeling that the punishment was not one which was uncalled for.

1454. (*Mr. Neate.*) Do you remember what was the age of the child?—It was a young child—I am not sure whether the age was weeks or months, but it was under a year.

1455. (*Mr. Waddington.*) Three months, I think.—Very probably.

1456. I think that that was a very deliberate case, she seemed to have bought the poison for that purpose?—Yes. It was clearly brought home to her, that she had poisoned the child deliberately. With regard to infanticide, it should, perhaps, be known that since that case occurred down to the end of the year 1864 there have been 39 convictions for wilful murder of children. I know that it is stated that there are very few convictions for infanticide. In 1850 there was no case of conviction; from 1850 to 1864, in every year but one, namely 1857, there have been either one or more cases; and in one year there were as many as seven. Altogether there were in the 13 years 39 convictions for wilful murder in cases of infanticide, and of those 39 cases 34 were for the murder of illegitimate children. I think that shows that juries are not much indisposed to convict on clear evidence. In most of these cases there is rather a disposition, I think, to find a reason for escaping from a conviction for murder, and if

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the evidence (which is frequently the case) is not very clear and convincing that the child has been born alive, the verdict is invariably "concealment of birth" and not "murder." But during the period of which I have spoken there has been an average of three cases in each year in which a verdict of wilful murder has been found; I do not know that in all, but probably in most of those cases, there has been a recommendation to mercy by the jury, concurred in by the Judge. In most cases the Judge himself writes immediately after such a conviction, and states that he does not think that it is a case in which the law ought to be carried into effect. Some few of those cases could hardly be called cases of infanticide—in one case the child was six years old.

1457. (*Mr. Bright.*) Have you any return of the number of cases in which there is reason to believe that the child was killed, and yet a verdict of "concealment of birth" was given by the jury?—There is no return, because it is very difficult to get it; but there have been a great many cases in which women have been put upon their trial upon the verdict of the coroner's inquest for wilful murder, and some of those cases are cases in which the Judge has expressed an opinion that the woman was not properly charged with wilful murder. It is, however, very difficult to say that there is no doubt in the case, or that the jury are not justified in entertaining a doubt, whether the child was born alive. If the child is 12 months old, or six years old, as in the case which I have mentioned, there is of course no doubt.

1458. Did I rightly understand you to say that the number of offences of this kind from 1850 has remained about stationary?—Yes. I have the number in each year.

1459. Will you state what number of cases there were in 1851?—Three.

1460. In 1853?—Seven.

1461. In 1856?—Four, and in 1857 none; in 1862 two; in 1863 two, and in 1864 five.

1462. Seeing that there has been no instance of Capital Punishment for infanticide since 1849, your figures shew that there has been no increase of that crime?—There has been no increase of that crime, so far as appears from convictions; it has varied from year to year, but certainly there has been no perceptible increase. In the last year there were five, but in the year 1853 there were seven.

1463. (*Mr. Hunt.*) I do not understand that the figures give the number of cases in which the child was destroyed, but the number of cases where the jury brought in a verdict of wilful murder?—Yes.

1464. (*Mr. Bright.*) You have stated that you think that where the evidence is sufficiently clear the juries do not hesitate to bring in that verdict; and, therefore, I assume that these verdicts are found upon fair evidence. If you take the first five years of the series and the last five, which will give the largest number of convictions?—In 1850 there were none. The last execution was in 1849, and beginning with 1851, the first five years would give 15 cases, and the last five years 17.

1465. Practically looking over the list, the state of that particular crime has remained the same during the whole of the 14 years?—I think so.

1466. At the same time that there have been no executions for it?—None. This is the number of convictions for murder for that particular crime.

1467. And during that time there has been no execution for that crime?—No. I mention that with reference to the fact which Mr. Bright has just now noticed, namely, that the law remaining the same, the practice has now been established that a woman is not

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executed for child murder—speaking of child murder as the murder of an infant. I do not say that cases might not occur, like that one in 1849, in which a woman would be executed, but there have been since that time five Secretaries of State, and more than half of those cases came before other Secretaries of State than myself. The rule has now been adopted of commuting the sentence, but I think that it is almost invariably done upon the recommendation of the judge, or in concurrence with him. I may mention one case which occurred, I think, last year before Mr. Justice Byles, in which, after passing sentence, he wrote to say that he thought that a very moderate punishment would be sufficient in the case, under all the circumstances, and recommended a commutation of the sentence to a term of imprisonment.

1468. (*Mr. Hardy.*) I suppose that almost all those cases are cases of infants, in the ordinary sense of the word, quite babies ?—I can give you the age of each. In the first case, in the year 1851, the child was a few weeks old, in the next two months old, in the next it was immediately after birth. In 1852, the two children were seven weeks old, and three weeks old. In 1853, one child was two weeks old, the next was ten days old, the next nine months old, the next five weeks, and then there was a case where the child was six years old, which was a case in Sussex, tried by the Chief Baron. I knew nothing of the case ; I was not then Secretary of State. In another case, in the same year, the child was two years old, the next was immediately after birth, the next was one year old, the next was three months old, the next was three years old, the next was a new-born infant, the next was three months old, the next was two months old, the next was 13 months old, the next was three months old, the next was a new-born child, the next was seven months old, the next was seven months old, the next was five months old, the next was ten days old, the next was $2\frac{1}{2}$ years old (that was not decided by me) ; the next was three weeks old, the next was four months old, the next was two years old, the next was 16 days old, the next was six weeks old, the next was one year old, the next was new-born, the next was six weeks old, the next was two weeks old, the next was nine months old, the next was nine days old. I have not mentioned one case which was not, strictly speaking, child murder, but the well-known case of a woman named Celestine Sommers, who murdered a child ten years old, but the sentence was not commuted on the ground of its being infanticide, the commutation was on the ground of her supposed insanity, and although I had great doubts afterwards whether the commutation was right, it was so far confirmed that she was soon afterwards removed to a lunatic asylum, and died insane.

1469. Then practically there were very few cases of conviction where the child was new-born ?—Almost all the children were under a year old, and some were new born. There were few comparatively, but there were several cases where the child was new-born. The doubt which I mentioned just now as to whether the child was born alive can only arise in the case of a new-born child.

1470. (*Mr. Hunt.*) Have you any particulars of the number of women executed for this crime within a few years prior to 1849 ? —No ; but I could get them. There was one case in 1848, but it was hardly a case of infanticide. A woman killed two children, which were not her own ; she had been living with a man, and had quarrelled with him, and she killed his children. They were four or five years old. With regard to these cases, I may say that the Judge almost always recommends the commutation. I believe that the Judges think that it would shock public opinion to hang a woman for infanticide. Many

of these cases are most distressing—34 of those 39 children were illegitimate. It is not unfrequently the case that the woman is deserted by the father of the child, who is well able to maintain it. It may be partly from an ill feeling towards him, but it is partly from despair and wretchedness and misery that she commits this crime, and it is felt that you should not inflict a punishment which shocks public opinion. At the same time I do not see how you can take that crime out of the category of wilful murder, because there may be cases in which a woman has poisoned one child after another, or has poisoned another person's child, in which it might be right that the law should be put in force. I only mention what the practice has been in late years. Those are the most distressing cases which can come before one. I do not think that it would be possible for any one, consistently with public opinion, which must have a great influence in these matters, to carry the sentence in these cases into effect; and that, I believe, is the opinion of almost every person who tries them.

1471. (*Chairman.*) In these cases the jury almost always find a verdict of "concealment of birth." I am speaking of infanticide?—Yes.

1472. The punishment for that crime, I think, is two years' imprisonment?—Yes.

1473. Do you consider that to be sufficient, or would you make any alteration in that respect?—I am not quite sure, but speaking from recollection I think that the Judges very frequently pass a sentence less than the maximum, and therefore, even if there was a power to pass a heavier sentence, I do not think that they would pass it. I think that one year's imprisonment is a very common sentence for a woman who is found guilty of concealment of birth. You must give a discretion to the Judges.

1474. (*Lord Stanley.*) Do you not think that cases occur of concealment of birth in which there is every reason to suppose that the intention may have been to take away life, although there may not be evidence sufficient to justify a conviction for murder, and that therefore, in such cases, it would be desirable to have the power of imposing a heavier sentence than two years' imprisonment?—It might be so. I have no doubt that many of those cases exist. I believe that many of the cases in which a verdict of "concealment of birth" has been given have been cases in which the woman has been glad to get rid of the child, and either by carelessness, or by some wilful act, she has put an end to its existence; but the evidence has not been sufficiently clear to compel a jury to find a verdict of murder in accordance with their oaths. There is a loophole, by which they can escape from finding a verdict which they are unwilling to find.

1475. (*Mr. Hardy.*) A suggestion has been made of limiting infanticide to a child of three months old, and taking that class out of the category of murder in the first degree. Would that meet your view at all?—I do not think that that would be at all expedient. I think that it would still leave a number of cases in which it would be difficult to give effect to the law. In one case a woman drowned two children in a canal, I think near Windsor. The father of them was a man with plenty of means to support the children, but he cast her and the children off, and she drowned those two children, being one or two years old. I do not think that that distinction could be maintained, and I do not know that it is a less crime to kill a child of two months old than to kill a child of six months old. In France, I believe, it is considered to be a greater offence.

1476. It has been suggested by one of the witnesses that you might

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limit it still further, and confine it to new-born children simply?—Even then I think that it would be giving a sanction by law to the idea that it was no very great crime to murder a new-born child.

1477. (*Mr. Waddington.*) Is not the murder of a new-born child the very offence which is made the most criminal in France?—I think so. I do not say that we ought to follow that practice, but as far as authority goes, it is against the adoption of the principle of regarding the murder of new-born children as a comparatively light offence.

1478. It was deliberately made a capital offence by the framer of the Code Napoleon, as distinguished from an ordinary case of murder?—Yes.

1479. (*Mr. Bright.*) Upon your argument that criminals who now commit burglaries would commit murder if murder were not capital, is it not obvious that such a law as Mr. Hardy has spoken of would induce a mother who thought of getting rid of her child to do it before it would become a capital offence?—Yes; and if it could be done with comparative impunity it would I think be more frequent than it is now.

1480. (*Mr. Hunt.*) But practically it is now not a capital offence, no woman is hanged for it?—She is not, but the law remaining as it is, I should be sorry that it should be supposed that I thought there could be no case of infanticide which would justify putting the law in force, as it was put in force in the case in Wiltshire in 1849.

1481. (*Mr. Bright.*) Have you looked into the case of the child who was six years old, which occurred when Lord Palmerston was Secretary of State?—I believe that Mr. Waddington knows more about the case than I do. I have not looked carefully into it. It was tried in Sussex, by the Chief Baron, and after communication with the Chief Baron, Lord Palmerston commuted the sentence; but I do not know the particulars or the grounds of the commutation. I have said that during the period which I have spoken of there have been five Secretaries of State, and some of these cases have come before every one of them. There was only one which came before Mr. Sotheron Estcourt, as he was at the Home Office for a very short time, and he took the same course.

1482. (*Mr. Hardy.*) In those cases in which the Judges recommend to the Home Secretary a commutation of the sentence, would it, in your opinion, be expedient to give them the power which they formerly had of recording sentence of death, telling the prisoner at the time that it would not be carried into execution?—I have no doubt that it would be desirable. That change in the law was made in 1861, and it compelled the Judge to pass the sentence in all cases, and I think that it has a very bad effect. The case which I have mentioned, tried by Mr. Justice Byles, occurs to me as one of the most recent cases. The woman is convicted, and sentence is passed with all the solemnity which always attends the passing of a capital sentence, and the Judge does not feel himself authorized, under the existing law, to hold out, any hope of mercy. He does not say, as he does in some other cases that he can hold out none, but the sentence of the law is passed with every solemnity. It throws no real responsibility upon the Secretary of State practically, because the Judge writes to say that he thinks the sentence ought not to be carried into effect, and when he does that it never is carried into effect; but it places the Secretary of State before the public in the light of interfering with the administration of justice, by setting aside a sentence which has been solemnly passed in open Court; and I think that it would be very right that where the Judge is decidedly of opinion that the facts of the case, he having heard all

the evidence, are not such as to make it necessary or expedient that the extreme sentence of the law should be carried into effect, he should be relieved from the necessity of passing that sentence, and that either he should pass some other sentence, or that the sentence of death as formerly should be recorded, in which case the Judge always recommended the commutation which he thought ought to be made.

1483. In your opinion would it be wise to confine that power to any particular class of murder, or to give the Judges the power in all cases of murder ?—I understood your question to refer to infanticide only. In other cases I could not give so positive an answer, but no doubt there are a few cases in which it might be desirable the Judge might exercise that discretion, and I should be inclined to give it to him. Formerly, before the alteration of the law which extended the period between the sentence for murder and the execution, the Judge was in most cases the only authority which could interpose, and the discretion rested entirely with him, the means of communication not being rapid. The sentence being carried into effect within 48 hours, the execution, if at a distance from London, probably took place before the Secretary of State heard of the case ; there was no interval during which an appeal could be made to him. In those cases the Judges, if they thought fit, exercised the power of reprieving, so that the Secretary of State might, if he felt so disposed, commute the sentence.

1484. (*Lord Stanley.*) There was no appeal from the Judge, excepting by his own wish ?—Just so. In London the law was different, there was what was called the Recorder's Report ; but taking the instance of a case tried in one of the Northern Counties, or in one of the extreme Western Counties, it was quite possible that the sentence might be carried into effect without any opportunity of an appeal to the Secretary of State. Practically, I do not think that those cases were frequent. But the Judge had the power of either leaving prisoners for execution, or of reprieving them if he thought that there were any circumstances which ought to be brought under the notice of the Secretary of State.

1485. (*Mr. Bright.*) Was that a permanent settlement of the matter, or was it merely that the fate of the prisoner might be disposed of by the Secretary of State ?—There was no commutation. The sentence remained, but the execution of the sentence was postponed till further directions.

1486. (*Mr. Hardy.*) Would it not be almost impossible to separate the cases of infanticide which you have read out from what is generally called "wilful murder ?"—It would be impossible to do it by any legal definition. There has been, I think, a suggestion that the crime of murder might be confined to the murder of a rational being, and not of an infant ; but I do not think that it would be possible to make such a distinction. The sacredness of human life is, I think, the great principle which is the foundation of law ; and the sacredness of human life being the great object to be kept in view, it is in order to protect human life that I am an advocate for retaining Capital Punishment in cases of wilful murder. I believe that life is better protected by that punishment than by any other, and that if that punishment was taken away many more cases of murder would take place, because murder might be committed with comparative impunity.

1487. Then would you be inclined to limit the term "murder" more narrowly than it is at present limited, by the legal view of it ?—I think that if there could be a classification of murder, as has been done in several of the States of America, it would very much facilitate the administration of the law, and would very much reduce

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the number of cases in which the exercise of the prerogative of mercy is called in, and which, under some circumstances, has a bad effect. I do not mean to say that the exercise of the prerogative is improper in the individual case, but it is so difficult in many cases to let the public really understand the grounds on which the commutation takes place, that false impressions are frequently produced, and some degree of uncertainty in the administration of the law is the necessary result, which I think would be avoided if there could be a division of murder into murder of the first degree and murder of the second degree, as has been done in several of the States of America, and I believe also in some parts of the Continent of Europe. The definition might be a difficult one to make, but if there could be a clear definition of that kind it would very much reduce the cases in which the interference of the Crown is now called into exercise.

1488. (*Chairman.*) Have you considered the matter yourself sufficiently to give us any opinion upon it?—I have brought some letters with me which I have found, and which relate to the period when the late Mr. Abbott Lawrence was Minister at this Court from the United States. It was in the year 1850. He was good enough, at my request, to procure for me some information from America with regard to Capital Punishment, and he sent me two valuable letters, one from a Mr. Storer, whom he describes as an eminent lawyer in the State of Ohio, and the other from the Honourable D. D. Barnard, an eminent lawyer and statesman in the State of New York. The letters themselves are quite at the service of the Commission, except that one is dated in 1850 and the other in 1851, and probably the Commission has later information. Mr. Storer's letter contains a tabular statement of the criminal law as it then existed in every State in America, showing to what crimes the punishment of death attached, and the following is his observation upon the point to which I was adverting just now:—"It will be seen that in several of "the States, homicide is divided into murder in the first and second "degrees and manslaughter. The distinction between the first two "grades, though much refined in practice, is really this—the first in- "cludes all cases where the malice is premeditated and express, such "as poisoning, antecedent threats or old grudges, lying in wait, &c.; "the second, where malice is implied only. Manslaughter includes all "other grades where the killing is not justifiable or by misfortune." That seems an intelligible distinction. At that time Michigan was the only State (and I am not sure that it is not the only one now) in which Capital Punishment had been abolished. One of these letters mentions the fact that in Maine and in Vermont a regulation had been made by which the sentences were not to be carried into effect until, I think, after a year, and not without a warrant from the Governor of the State. That rule had recently been laid down, and whichever of these gentlemen adverts to it says that practically it would probably lead to the abolition of all capital punishments—that it would be hardly possible, after such a lapse of time, to carry them into effect. Mr. Storer says, in his letter to Mr. Lawrence:—"Some months since I received your letter enclosing several ques- "tions propounded to you in relation to the Criminal Law of Ohio. I "delayed to answer until I could do so fully, and, to my own mind, "satisfactorily. The answers are now enclosed, and a tabular state- "ment of the criminal code of all the States in the Union. This state- "ment is prepared by my friend Packard, of Philadelphia, and I have "aided him in collating the materials." From that statement it appeared

that there was only one State then, namely, Michigan, in which Capital Punishment for murder had been abolished; and there were three States, namely, Alabama, Indiana, and Ohio, in which murder was divided into two degrees, the first being capital and the second being punishable with a secondary punishment. At that time the penalty of death attached to a great many other crimes in some of these States—in several of them to rape, burglary, and arson. But the law may have been materially altered since that period. There was an attempt, Mr. Storer says, made, very soon after the abolition of Capital Punishment in Michigan, in both Houses of the Legislature, to restore it, and it failed. The majority were for maintaining the abolition, although the effect of it was stated to have been injurious. What one would like to have, if possible, would be the statistics of murder in these cases, but I have not got them. The matter is very generally stated in this letter.

1489. (*Mr. Hardy.*) If murders were classified, I suppose that you would not classify them with reference to the age or condition of the victim, but with reference to the deliberation of the act itself?—Certainly. There is in fact an immense variety in the moral guilt attaching to crimes which now come under the general definition of "murder." It is a very different thing when murder is perpetrated with a great deal of previous deliberation, as in the case of poisoning by repeated doses of poison, perhaps administered for weeks or months, for the purpose of taking away life—for the sake of gain, or whatever the motive may be—that is very different from a case in which a murder is committed under the influence of a strong passion, or a sudden impulse, but not so sudden or the result of such provocation as to reduce the crime to manslaughter. It is that great distinction which makes the exercise of the prerogative of the Crown necessary in many cases, in order to supply in fact the defect in the law owing to its classing a great variety of crimes where life is taken away under the general definition of murder, and attaching to all the penalty of death. If it was not for the exercise of the prerogative, I think that the law could not remain as it is, but that public opinion would demand a change. But the power which there is now of reviewing all cases with reference to the circumstances, and communicating fully with the Judge who has tried the case, and taking into consideration any representation or recommmendation to mercy which can be made upon reasonable grounds, in practice reduces the number of executions, and, generally speaking, supplies the want of a classification. I say "generally speaking," because there are still cases where an execution takes place in which probably the crime would come into the second class rather than the first, if that legal definition existed; that is to say, cases where, in fact, life is taken with a sufficient amount of deliberation to make it murder, and with the decided intention of taking away life but where probably a quarter of an hour before there was no intention of taking life.

1490. Then you would leave the case of the killing of children by women, if there was deliberation, in the same position as it was before?—Clearly; and I think that in almost all those cases the murder would be murder in the first degree, except in a case, which may be easily conceived, in which a woman immediately after birth, in a state of weakness and great excitement, might take away life.

1491. Would you in that case still leave to the Judge the power of giving a less sentence than the extreme one?—I would; because even where the legal definition of murder clearly embraces the crime, it may be inexpedient that the law should take effect, with reference to

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the circumstances in which the woman has been placed, and to public opinion with regard to the facts. In my view the Judge, if he is clearly of opinion that the sentence ought not to be executed, and deliberately sits down immediately after the sentence is passed to write that opinion to the Secretary of State, ought to have the power of publicly doing what he now does privately, and of letting the reasons be known publicly in court at the time when the sentence is passed. I understand your question to apply to infanticide.

1492. I have understood from you that you could not classify infanticide, and that therefore the power given to the Judges must be general, if at all?—You could not classify infanticide any more than any other class of murder. As I have said, there might be cases in which the circumstances under which a woman takes away the life of a new-born child might be such as to take the crime out of the first degree of murder, if that division was made.

1493. (*Mr. Bright.*) With regard to the first degree of murder I presume that you would still leave the power of review, and respite, and commutation, with the Secretary of State, as at present?—It is quite impossible, if the Crown has the prerogative of mercy (and I presume that no one would propose to take it away), but that that prerogative must be exercised upon the advice of some responsible person, and therefore of course the Secretary of State would be bound to look carefully into any case which was brought before him; and if there were circumstances which, in his opinion, justified the interposition of the Crown, he would be bound to advise that that interposition should take place. I cannot conceive any state of the law, or any circumstances, whatever the punishment is, (this does not apply to Capital Punishment only,) in which that responsibility could be taken away from some minister of the Crown.

1494. If it were generally understood that excepting in cases in which it would be intolerable to hang a person, the punishment should take place in cases of murder in the first degree, would you not run the risk of re-enacting, practically, Capital Punishment for cases of child murder?—I did not say that if you could make that classification and division the law must take effect in all instances; what I intended to convey to the Commission was this,—that I think that the number of cases would be greatly reduced in which applications are made to the Crown, and in which the Crown is advised to interfere and to commute the sentence. With regard to cases of clear and deliberate murder, the punishment, I may say generally speaking, follows the conviction for the crime. There is no case which I remember, in which there has been premeditation proved, where there has been a deliberate case of wilful murder, (putting aside the case of women destroying children,) in which the law has not taken effect, unless some extraordinary circumstances have intervened to take it out of the general rule; but there are numbers of cases in which, the verdict being a right verdict in the opinion of the Judge, and nobody doubting that it is justified by the state of the law, the circumstances have been such as to induce the minister charged with that duty, and I think very properly, to advise the Crown to interpose and to prevent the law being carried into effect. Many of those cases would be disposed of in another way, and I think more satisfactorily, by the classification of murder, and the Judge passing a sentence which really would be carried into effect.

1495. (*Mr Hardy.*) I should like to know your opinion upon the question whether or not you would give to the jury the power of altering the nature of the punishment by any finding of theirs?—I have thought a good deal upon that subject, and I am clearly of opinion, with all

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deference to others who may differ from me, that it would be undesirable to do that. I understand the question to mean, whether it would be desirable to adopt the law which exists in France, which allows a jury to find extenuating circumstances, and thus to take the case out of the category of cases to which Capital Punishment attaches, and to reduce the punishment by that means. I believe that in France the effect has been, that in a very large proportion of cases in which a verdict of wilful murder has been found, the verdict has been accompanied by the finding of extenuating circumstances, and in some instances, so far as one can judge by the reports of the proceedings, the case has been one of very deliberate murder indeed. I have no doubt that there are numbers of cases in which executions have taken place in this country in which extenuating circumstances would have been found by juries in France, and in this respect I think that it would lead to great uncertainty. One jury would adopt one rule and another jury another rule, and I think that it would thus lead to the greatest possible uncertainty in the administration of the law. If it was controlled (as I see has been suggested by a very eminent authority) by the discretion of the Judge, so that the effect of the jury finding a verdict with extenuating circumstances was not to prevent Capital Punishment attaching, except with the concurrence of the Judge, it really would amount to nothing but what takes place now in a recommendation by the jury to mercy. If the Judge is satisfied that the grounds of their recommendation are reasonable, he reports it to the Secretary of State, and the sentence is generally commuted.

1496. (*Mr. Bright.*) Practically, would not the jury have the determination of the punishment if they were at liberty to bring in a verdict of murder in the first degree, or in the second degree, inasmuch as in the one case the punishment would be capital, and in the other it would be a secondary punishment?—Not to any greater degree than they now have with regard to a verdict of murder or of manslaughter. I think that, generally speaking, they take the law from the Judge. There have been cases, no doubt, in which a verdict of manslaughter has been given where a verdict of murder would have been more satisfactory to the Judge. But where the Judge expresses his own strong opinion that the law does not justify a verdict of manslaughter, I think that juries are generally disposed to yield to it. There is one remarkable case which occurred at Winchester, not very long ago, in which a man was tried for the murder of a woman. The detailed particulars were not known, but he lived with the woman, he was found in the room, and she was found with her throat cut, I think, and he was tried for it. There was every presumptive evidence of his being the guilty person, and I believe nobody entertained any doubt as to his guilt; but the jury asked the Judge, in that case, whether they could find a verdict of manslaughter. I suppose that what was passing in their minds was—may we not assume circumstances which have not been given in evidence, such as a sudden quarrel?—The Judge said, "No, it is either murder or nothing," and they found a verdict of "Not guilty." I think that they would there have found a verdict of manslaughter if they could.

1497. (*Mr. Neate.*) Is there not now somewhat of the same conflict between Judges and juries as there was with respect to libel, when the Judge used to tell the jury that they were bound to take the law entirely from him?—It would be a question of fact if there was a classification. If you put murder in the first degree upon premeditation, evidence of premeditation must be given, and the jury would be the proper judges whether the premeditation was proved. What the Judge would have to tell them would be, "If you are satisfied that there

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" has been premeditation in this case, if a week before the act the " prisoner was plotting this murder, and if he bought the poison and " administered it to the deceased, then I must tell you distinctly that " the law puts that into the first class of murder, and if you find any- " thing you must find that." But the jury must be the proper persons to find whether the premeditation was proved, and only to that extent would they have the power of finding a verdict of murder in the first or second degree.

1498. Would not the jury have the right of finding a verdict of manslaughter, and would the judge have any right to reject it?—Of course a trial by jury implies that no person can be found guilty except by the verdict of the jury, and there are sometimes perverse verdicts. I am not now speaking of murder; that observation does not apply more to the case of murder than to any other case.

1499. Have there not been cases in which the Judge has said, " I " will not take a verdict of manslaughter?"—The case which I mentioned just now was a case of that sort; the jury asked the Judge for information whether they might find a verdict of manslaughter. I presume that what they meant was whether the facts proved amounted in the opinion of the Judge to murder or manslaughter. He told them that if they were satisfied that the facts were as they had been proved in evidence the crime was murder; but I do not know that a Judge can refuse to take a verdict; he may desire the jury to reconsider it, but if the jury persevere in the verdict, I do not know that the Judge can decline to take it. Juries have sometimes found a verdict of manslaughter in cases where the Judge probably would have been better satisfied, upon the evidence, with a verdict of murder, but not very frequently.

1500. Will you be good enough to state a little more precisely the grounds upon which you would advise the Crown to entertain a recommendation to mercy; for instance, should you consider provocation one of those grounds—I do not mean immediate provocation, but the provocation of an old injury, such an injury as would justify (so far as anything would justify) an abiding desire of revenge?—That might be one element in the consideration of the case, but it is impossible to define particular facts which would justify a recommendation to mercy. I should say that, if it had been an injury of old standing, and if a man, to revenge it, deliberately took away the life of another person, if that stood alone it would form no ground whatever for advising the Crown to interpose.

1501. You would not consider, as the French do, the desire of obtaining possession of a particular woman, and removing the obstacle to it, a sufficient ground?—I should certainly not consider it any ground whatever.

1502. (*Chairman.*) I apprehend that each case which comes before you for the exercise of mercy must stand upon its own merits?—Certainly.

1503. It is very difficult to define what ground would actuate you in recommending the Crown to exercise the prerogative of mercy?—Certainly; but I may say, generally, that there are a number of cases so clear that although there are very few in which there is not some petition, yet they admit of no doubt whatever, and the petition is not entertained.

1504. Are the applications to the Crown for the exercise of mercy very numerous?—Very few cases of capital conviction occur in which there is not some petition on behalf of the prisoner; but there are cases so clear, and in which the sentence is so entirely in accordance

with public opinion, that there is either no interference on behalf of the prisoner, or so slight a one that it really is not entitled to any consideration, no grounds being stated. I may say that frequently there are applications from a society of very well-intentioned persons, who are in favour of the abolition of Capital Punishment, and they state that as the ground of their interference. That is a statement which has no weight at all, because it is asking the Secretary of State to change the law instead of administering it, and that is not a case in which a reference could be made to the Judge. But if circumstances are stated which ought to have an influence upon the decision, and if any facts are urged in favour of the prisoner which have any plausible ground, the memorial, as an invariable rule, is sent to the Judge, without any expression of opinion, for him to report upon; and frequently personal communications take place between the Secretary of State and the Judge, in which the case is very fully gone into. That occurred not long ago, where a man was convicted of throwing a woman into a lock at Worcester, and drowning her, in which case the Judge was good enough to come to the Home Office, and without expressing any opinion of his own, he stated all the reasons which led him to believe that the prisoner was guilty, and then stated all the reasons which he thought ought to be entertained in deciding as to carrying the sentence into effect. There is immense advantage in that, and it generally produces a very satisfactory result.

1505. In these cases, has the Secretary of State invariably a communication with the Judge?—No; but when the memorial states facts or circumstances, or considerations which, upon the face of them, might be regarded as having an important bearing upon the case, that memorial is invariably sent to the Judge, and he always answers it in writing; but if any doubt remains, or if his answer is not a very decided one, he either offers to come to the Secretary of State, or the Secretary of State requests to see him, and then the subject is very fully discussed, and I should add with the assistance of the Under-Secretary, Mr. Waddington, although the undivided responsibility of the decision exclusively rests in all cases with the Secretary of State.

1506. (*Mr. Bright.*) You do not communicate with the Judges on every case?—No. Take the case which occurred the other day of the man Köhl, the German. I never heard of that case except from the newspaper. I read the report, as everybody else may have done, in the newspaper; but not a single letter or communication was addressed to the Home Office upon the subject; and the case seemed so clear, that there was nothing to induce me to communicate with the Judge, and the sentence was carried into effect, I believe, with universal consent; but that is rather an exceptional case.

1507. (*Mr. Ewart.*) Do you think that the Home Office should state their reasons when they grant a reprieve?—I have done so occasionally, where it has been possible to do it. In the Worcester case, I gave my reasons to the Mayor of Worcester; but generally speaking, they are not given.

1508. You would not recommend that it should be done?—No, not in all cases.

1509. (*Mr. Justice O'Hagan.*) With reference to an answer which you gave to Mr. Hardy, am I to understand that you would give to the Judge in every case, say in cases of the first class of murder, the power of mitigating the sentence according to the merits?—I have said that I would do so in cases of infanticide, but in other cases I should speak more doubtfully. I am inclined to think that a discretion might be

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left with the Judge. I think that it would be very safely exercised, and only in cases where he thought it very clear that the sentence ought not to be carried into effect.

1510. That would in effect be doing directly by the Judge what is now done by the Secretary of State. Would it not be better to abolish altogether the power of recording sentence, and to have the thing done directly by the Judge?—The power of recording sentence is abolished.

1511. But you were asked whether you thought that it would be well to restore it, and you answered that question in the affirmative?—The question divides itself into two parts—whether the discretion should be vested in the Judge in the first instance as to passing the sentence of death, or of passing a less sentence, or whether he should merely record the sentence of death, letting the ultimate decision rest with the Secretary of State. That was the case formerly: the Judge recorded the sentence of death, and in that case it was never carried into effect; but no other sentence was passed in Court.

1512. It appeared to me that you were of opinion that you might safely give to the Judge in such a case the power of doing according to the facts and merits what was proper to be done, and of mitigating the sentence in every case of Capital Punishment?—I should hesitate in going so far as that. In the case of infanticide, I think that it would be very desirable that, where the Judge is clearly of opinion that a less punishment than Capital Punishment is the one which ought to be awarded to the crime, he should have an opportunity of passing that sentence according to his own discretion in open Court, where the reasons would be known and the evidence would be fresh in the recollection of the persons who heard the sentence passed, rather than that he should pass the capital sentence, and privately recommend a mitigation of it. But in other cases I think it doubtful whether the Judge should have the power of awarding a less punishment than the Capital Punishment. There might be cases in which he would be so clear that the punishment ought not to follow the crime, that he would not pass the sentence; but I doubt as to giving him in all cases the power of passing a less sentence. I believe that the Commission have before them a return, prepared at the Home Office, with regard to Capital Punishment in the last 40 years, divided into decades. It is rather remarkable that since the year 1836, although the law has extended Capital Punishment during a considerable portion of that period to other crimes than murder, there are only five cases in all those years in which any person has been executed except for murder; and I believe that all those five cases have been for attempts to murder. The change in the law which was made in 1861, limiting Capital Punishment to cases of treason and murder, really did very little more than assimilate the law to what had long been the practice. There was one case in this return which occurred as late as 1861, in which a person was executed, not for murder,—but practically it was murder. There are 15 cases for murder, and 16 executions given for that year; that was a very remarkable case—a case in which a man had cruelly maimed a woman; he had battered her head and face with a stone, and left her, supposing that he had murdered her; but she recovered. The medical man who was examined said that scarcely any other person could have recovered; it was like a person rising from the dead to give evidence against the prisoner; and the Judge, who then had the power of recording the sentence, thought it so bad a case, and that it came so near to murder (in fact really it was the same thing), that he passed

the sentence, thinking that it ought to be carried into effect. But the law was changed immediately after that.

1513. (*Mr. Bright.*) Was not the change of the law actually in process at the time?—Yes; the law had in fact been changed before the man was executed, but not before the conviction, and therefore he was legally executed, and I thought that as the Judge had passed this sentence openly in Court, I believe with an entire concurrence of opinion in that part of the country, it would be hazardous to interpose and to say that the sentence of the law should not be carried into effect.

1514. Should not the man have had the chance of the recovery of his victim; because there are many cases in which violence takes place where death is not intended, but ensues, it may be, from the mismanagement of a medical man, and the person is tried and hanged for murder?—I do not say whether it was right or not, but I want to explain the circumstances, as there appears in the paper to which I have alluded to be one case even in 1861, in which year the law was changed, in which an execution took place not for actual murder, but it was scarcely distinguishable from murder.

1515. Are not all attempts to murder practically murder upon the same theory?—Perhaps they may be, if the intention is not changed during the process of the deed; that is to say, a man may attempt to murder another, and may relent and abstain from carrying his intention fully into effect, but in the case to which I refer it was not so.

1516. Take the case of a man shooting at another behind a hedge, intending to kill him, he does not kill him, he is tried, and he is not convicted of murder, and is not hanged?—Morally, the guilt is quite the same, but you cannot apportion human punishment absolutely to degrees of moral guilt, and although I think that those cases are equal to cases of murder in moral guilt, it is desirable that there should be a difference in the punishment between them and actual murder, because frequently the existence of that difference saves life by inducing a person to abstain from completing the murder which he may have contemplated.

1517. But in the case at Chester, to which you have referred, the other rule was taken?—Yes, but the man thought that he had murdered the woman.

1518. (*Lord Stanley.*) You put it in this way; that unless the person actually dies you can hardly have the absolute certainty that the intention was to cause death?—You may put it in that way, although when a person shoots from behind a hedge, as Mr. Bright put it just now, and the shot takes effect but does not take effect in a vital part, one can hardly suppose that it was not intended so to do.

1519. (*Mr. Hardy.*) Or where a person gives too much poison for the purpose, and it causes sickness, but not death?—Yes.

1520. (*Mr. Bright.*) You began your evidence by alluding to the great dread with which Capital Punishment was regarded. I presume that you refer chiefly to the dread which is exhibited by prisoners after their conviction?—No; I rather referred to the general dread of Capital Punishment which is entertained. I think that it is a punishment which affects the mind with great terror, and it is my belief (it is impossible to have demonstrative proof of it) that it does check many persons in the commission of crime where there is no moral check which could influence them, and where nothing but the dread of punishment would operate.

1521. As Secretary of State you have no opportunity of judging of that question any more than anybody else?—None. I think that I have said so.

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1522. I understood you to say that your experience as Secretary of State would lead you to believe that there was a great dread of Capital Punishment in the minds of convicts ?—Not my own experience, but the opinion of other persons who have had opportunities of forming an opinion as to the effect of that punishment.

1523. With regard to all those cases, which are cases of an overruling passion, and an overruling desire for the possession of something, or cases of jealousy, or of revenge, in all those cases of what may be called overruling passion, is it not clear that the dread of any particular punishment must have a very inconsiderable effect upon the criminal, and that in proportion as passion possesses him the effect of the punishment must be less ?—In the particular instance I think that it is so ; at the same time when you speak of the desire of anything, if it is the desire of acquiring property, by robbery, I do not think that there the passion can be of that overpowering nature which could in any degree affect the power of a man's reason ; but if it is sudden revenge, or sudden passion of the kind which is frequently stimulated by a certain degree of intoxication, I can believe that the punishment may not have an effect upon the individual at the moment, but I think that the knowledge of the punishment which is attached to the crime may, and probably does, prevent other persons from putting themselves in that position in which their passions would obtain that mastery over their reason.

1524. But as regards the special case to which Capital Punishment is applied, and every exactly similar case which may occur, is it not the case that the punishment can have almost no effect where that passion prevails ?—I believe that there are cases, as I have said before, in which the crime is committed under the influence of overpowering passion, which produces a recklessness and prevents any contemplation of the consequences which may ensue ; the man does not even hope to escape. Cases have occurred in which crimes committed under those circumstances have been followed by the immediate voluntary surrender of the criminal to justice ; he is willing to take the consequences, whatever they may be.

1525. (*Mr. Waddington.*) And it is not uncommon, I believe, for a person to commit a murder and to kill himself immediately afterwards ?—That is so.

1526. The fear of death does not at all affect the man in that case ?—Just so ; but those are exceptional cases, for which you can hardly legislate.

1527. (*Mr. Bright.*) I understood you to say that the crime was a decreasing crime in the country ?—I said that it was decreasing in proportion to the population ; it is actually increasing, as appears from the statement which I put in just now.

1528. Would you venture to attribute that decrease to the number of public executions which have taken place of late years ?—I do not say anything now with regard to public executions, but I do attribute it in a certain measure to the dread which Capital Punishment instils into the mind of that class of the population who are not under the influence of any restraining moral principle. I think that if the punishment of death was taken away great apprehension would be excited, and I think justly excited, in consequence, and that it would be felt that a precaution had been taken away which really now operates to the protection of life.

1529. But if you found that that anxiety did not exist in any other country where Capital Punishment had been abolished, do not you think that you could have the courage to imagine it possible that society

might survive a change of the law here, and that such fears would not be entertained ?—If I heard that Capital Punishment had been generally abolished in other countries, similarly circumstanced to our own, I should think so, but I do not know any large state or country in which it has been abolished. It has been abolished in certain States of America, Michigan is a small state, and I do not know what the results have been. It has been stated to have led at first to an increase in the number of murders.

1530. Practically, if you take the number of executions which occur in some of the countries of Europe they do not amount to one a year. In Russia, practically (not speaking of political offences), the punishment of death is understood long to have been abolished, and in Tuscany the same, and there seems to be no greater apprehension of danger in those countries ?—I do not know the statistics of those countries sufficiently to give an opinion, but I should like to know whether you refer to discovered murders, or to murders, actually perpetrated ; whether in Russia, for instance, murders do not exist, or murderers are not apprehended and tried and convicted. One would like to know the number of trials. In Russia, I find that for all political offences, even down to the crime of being a member of a secret society, with a political object dangerous to the state, Capital Punishment is applied. I presume that the Government of Russia think that to be the greatest crime which can be committed, and have therefore applied to it the punishment which they think the most deterring.

1531. But you would not agree that it has been very successful ?—I do not know in what number of cases it has been inflicted, but that has been the law in Russia.

1532. We have had evidence with regard to infanticide. I should like to ask you a question upon the subject of hanging women. You say that public opinion is adverse to so doing ?—For child murder.

1533. Do you not find it the same with regard to other murders ?—No, not to the same degree. I may refer to the case of the Mannings, where the husband and wife were both hung for a most atrocious murder, and I do not think that in that case there was any public sympathy in favour of the woman. Where the crime is of a nature to lead the public to believe that the sentence is a just sentence, and that it ought to be carried into effect, although there is something revolting in hanging a woman, as there is in hanging a man, but more so in hanging a woman than in hanging a man, yet I do not think that there is any sympathy for a woman under those circumstances.

1534. Within the last few months there was a man hung at Stafford for killing a child ?—Yes ; the man and the woman were both convicted.

1535. It was a young child ?—It was not very young, it was seven or eight years old, I think. The man and the woman were convicted jointly, they were both parties to the murder.

1536. In the case which you have read, which occurred at the time when Lord Palmerston was Secretary of State, a woman was convicted for the murder of a child six years of age, she was not capitally punished ?—No ; I do not know what the circumstances of that case were, or what were the grounds for the commutation ; there may have been special circumstances.

1537. I happened to have seen Lord Palmerston several times during his tenure of office, and I found him very much indisposed to inflict the capital penalty. There was a case at Manchester not very long ago, of a man of the name of Taylor and his wife, who were tried for killing a collector of rents, and who killed their children ; three or four children were found dead in bed, the woman was acquitted and the man was

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convicted and hanged. There is this case which has lately happened at Stafford, in which both parties were convicted and the man alone was executed; and there are many other cases in which women have been convicted and have not been hanged?—But it was the operation of the law which prevented that woman being hanged; she was found to be with child, and then the law interferes, and prevents the execution taking place. The sentence has not been commuted, but she is still under sentence of death, but being found to be with child the sentence is necessarily respited by the operation of the law, and with no interposition on the part of the Crown. I may say that whenever that takes place the sentence, practically, is not carried into effect; it would be undesirable, on every ground, months after the sentence has been passed, and after the woman had gone through her confinement and recovered from it, to bring her up for execution; but it is the operation of the law, and not the exercise of the royal prerogative, which interposed in the case at Stafford.

1538. Are you prepared to state to the Commission that, all other things being equal, a woman has not a greater chance of escape, first of all from the jury, secondly from the Judge, and thirdly from the Secretary of State, than a man has. I ask that question upon your experience?—I think that there would be less disposition to find a woman guilty if there was any mode of escaping from such a verdict, than there would be in the case of a man, unless in a case of the kind which I alluded to just now of Manning and his wife. There the man and wife had equally participated in the crime and were both found guilty; but in some cases, I think that there would be a greater desire that a woman should escape than there would be in the case of a man. Juries would perhaps give what is called a more merciful consideration to the facts in the case of a woman; but I do not know that that is a universal rule.

1539. Will you give me an answer with regard to the Secretary of State, whether, all the particulars of the case being the same, a woman would not have a sensibly greater chance of escape in your office than a man?—Under some circumstances she would. Take the case of the murder, not of an infant, but of a child a few years old. I remember a case in which a man murdered a young child of his own for the sake of getting the money which would come from a burial club, and he was executed. There is a case among these papers in which a woman did the same thing, and she was not executed.

1540. Would you say that with that growing tolerance, if I may use the word, or mercy towards women guilty of this offence, the tendency has been to increase the number of murders by women?—I do not think that murders by women have ever been very frequent, with the exception of cases of infanticide. There have been some bad cases of poisoning, but I think that, generally speaking, murders are not committed by women, except as accomplices with men. I am not able at all to say whether they have increased or decreased, but I probably could ascertain the fact. The statistics in the Home Office would perhaps enable me to do so.

1541. (*Mr. Hardy.*) Do not the judicial statistics show the cases of females?—Yes, but I do not know that they go back far enough. A murder by a woman, putting aside child-murder, is of very unfrequent occurrence.

1542. (*Mr. Ewart.*) Have there not been some bad cases of poisoning by women?—Yes.

1543. (*Mr. Waddington.*) There was the case of Catherine Wilson.—Yes. There have been very bad cases indeed.

1544. (*Mr. Hardy.*) In those cases of poisoning execution has very often taken place?—Yes.

1545. (*Mr. Bright.*) With regard to many of the cases of child-murder, taking the cases of children under six years old, is it not really a greater crime than any other crime of murder, looking at the natural tie which a mother has to her child?—It may be said that the murder of a child by a parent, or the murder of a parent by a child, is a murder involving more moral guilt than that of any other murder. But, taking all the circumstances into account under which a woman gives birth to an illegitimate child, I cannot say that in all cases it does involve a greater degree of moral guilt.

1546. I am not now speaking of a new-born infant, but of a case where a woman gets rid of a child because it is an encumbrance upon her. She cannot go to service on account of it, or perhaps she thinks that she could marry somebody if she had not the child about her. In all cases of that sort, which are not cases of desperate poverty and weakness and despair, is not that crime morally far greater than if the woman killed somebody else's child or some grown up person?—It depends upon the motive. It certainly argues a total want of that natural affection which every person with right feelings ought to entertain, and does entertain. To that extent it does imply a greater degree of moral guilt.

1547. With regard to what is being done throughout Europe and the American States, is it your opinion, speaking generally, that the opposition to Capital Punishment is increasing, and that the number of capital punishments is constantly diminishing, and has been so for many years past?—I have no means of forming an opinion upon that point. I do not know what the recent statistics with regard to Capital Punishment, or with regard to the crime of murder, are in America, or indeed in Europe. I see that a good many cases of murder occur in France, merely judging from what I see in the newspaper.

1548. There is one question which I dare say you will answer very frankly, as far as regards the office which you have held for 12 years. Would it not be a relief beyond all description to yourself if the determination of these cases did not rest with you?—It imposes a very painful duty on the Secretary of State. But in answering that question, I must add that the duty must be imposed upon somebody, and if a person assumes that office he must assume it with all its duties and with all its responsibilities; and, painful as it is, he cannot shrink from it, and I have never seen any suggestion made of any mode in which he could be relieved from that responsibility. It is frequently a very painful duty.

1549. Speaking of yourself, or of anybody else in that office, would it not be a very great relief to the Secretary of State if it were possible to assure the security of property and life as much by the abolition of Capital Punishment as by the continuance of it?—Undoubtedly; and if you can prove to me that you could secure life (I do not say property) by any other punishment but Capital Punishment, and as effectually, I should be an advocate for its abolition. I do not at all advocate the retention of Capital Punishment on the ground that it is a duty to put to death a murderer, or that anything like vengeance ought to enter into the punishment. My opinion in favour of its retention is founded exclusively upon the interest of society, and upon my never having yet been convinced that you could substitute for it any other punishment which would have the same effect; if you could I should certainly be in favour of its abolition.

1550. Have you not found in the scores of cases which have come

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before you, that the decision was one of extreme difficulty; that you could draw no line; that you were obliged, as it were, or thought yourself obliged, to apply the same tremendous punishment to crimes which you knew to be of a very different character, and that in point of fact it has been positively a chance in your own mind as to what should be the result in some of those cases, and that you cannot reconcile the decisions which you have come to in some cases with the decisions in others, though in all the cases you have been equally honest?—I should not say that it was a chance; I think that there are cases involving so many difficult considerations, as to require the most anxious thought and examination, and I am by no means prepared to say that the result arrived at has always been one entirely satisfactory to my own judgment. Looking back upon the cases which I have had to decide, there are one or two in which I doubt whether the commutation was fully justified; but I do not now remember any case in which, if the decision was to come over again, I am certain that I should arrive at a different conclusion; it may be so, but I do not remember any. I have never felt that I did wrong in letting the sentence of the law be executed, taking into consideration all the reasons which ought to influence me. But it must be understood that I think the duty of the Secretary of State is not to make the law, but to administer it, with this exception, that in the case of infanticide, as I have said, practice has very much altered the law, although the law might still be enforced. In other cases, where the crime is clearly proved, and where there are no circumstances to justify a compliance with the recommendation of the jury to mercy or a commutation of the sentence consistently with keeping up, as far as possible, the apprehension of the certainty of the punishment in cases of murder, I think that the duty of the Secretary of State is clear. He has, no doubt, to deal with facts which it is difficult always to satisfy himself about.

1551. With regard to the law, are you not as much a part of the law as the Judge with respect to these cases?—I think not; where a jury has found a verdict and the Judge expresses himself perfectly satisfied with it, I do not think that it would be right for the Secretary of State to say that the Judge and the jury are wrong, and that it is a case not of murder but of manslaughter.

1552. But practically, from the mode in which the Home Office has been called upon to interfere for many years past, have you not, as the Secretary of State, become as much an institution with regard to these offences as the Judge himself; because, I think, you have admitted that there is scarcely ever any case in which some representation is not made to you upon it, and in which you have not to give some decision?—There are many cases in which the representation is of a nature which involves no responsibility; the case is so clear that the representation is not entertained; one reads the memorial and answers it. There are many other cases in which the case is very different no doubt. But I should like, upon this point, to state that I see that there is an impression from what is written upon this matter, that the duty of the Secretary of State is to sit as a Court of Review, and to re-try cases and to set aside verdicts. The cases of that kind are extremely few; there was Smethurst's case, which was not decided by me; there the facts of the trial were re-opened. And one case, occurred certainly to myself, which was a case of medical evidence in which I had a great deal of communication with the Judge. I did not think it altogether satisfactory, and I think that the Judge was of the same opinion. In the great majority of these cases there is no doubt as to the verdict being right, and then the question is whether it is a fit case for the in-

terposition of the royal prerogative in the exercise of mercy. No legal tribunal could decide that question, it must be done by some responsible minister. I also wish to state that, whatever tribunal was established, if any could be established, to assist the Secretary of State, there must be some one individual ultimately responsible, to whom an appeal might be made at the last moment upon the allegation of new facts being discovered or new arguments being adduced, and it is quite impossible that any decision by a court of law could be so final as to exclude an application to the Crown for mercy.

1553. (*Chairman.*) It always must come back to that?—Yes. With regard to the assistance which the Secretary of State has, I may say, that although the decision is that of the Secretary of State, and the undivided responsibility is his, yet he never decides a case of any doubt without availing himself of that advice which is always close at hand, namely, that of the Under Secretary for the Home Department, who pays the greatest and the most minute attention to all these cases, and if necessary, the Secretary of State may call in other assistance. I had one very difficult case to decide of the captain of a ship and two mates, who were sentenced to death a few years ago at Liverpool for murder. Lord Cranworth was then Lord Chancellor; he had been a very eminent Common Law Judge, and was conversant with the Criminal Law, and he spent hours with me upon that case, and gave me the full benefit of his legal knowledge and experience. Wherever there is a case of great difficulty we obtain the most able assistance which can be had, but I do not think that it would be possible to require that the Secretary of State should always have the assistance of particular persons. The Assizes are now held three times a year in a great many places, and in London every six weeks. Cases occur when the Secretary of State is at a distance from London, and the members of the Government are dispersed, and the Judges are dispersed, and it would be quite impossible to collect a Court to go into these cases and adjudicate upon them; at the same time he can always get assistance in deciding any doubtful case.

1554. (*Mr. Ewart.*) I think you began by stating that you thought that Capital Punishment could not be dispensed with for murder?—That it could not be dispensed with consistently with the safety of life which the public require and are entitled to.

1555. Was there ever a time when you thought that it could not be dispensed with for other crimes than murder?—I think not. Before I took the office which I now hold it had been reduced to very few crimes, and in those cases the sentences were scarcely ever executed. I prepared the draft of a bill in 1848, soon after I came to the Home Office, for diminishing it still further. Within my experience, practically, it has been confined almost exclusively to murder. I believe that the only other cases (and they have been very few) during the last 25 years have been cases of attempts to murder, and bad cases of that character.

1556. Whatever may have been your opinion upon the subject, there has been a time when many other persons of great authority have thought that Capital Punishment could not be dispensed with for other crimes than murder?—Yes. I do not mean to say that I have differed with them, but I have not had that question practically brought before me, because the cases in which Capital Punishment has been inflicted for those crimes have been extremely rare.

1557. Sir Robert Peel justifies its infliction even for stealing to the value of 5*l.* in a dwelling house?—But you must know as well as

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anybody the difficulty which there is in making a great alteration in the law; and if Sir Robert Peel, when he effected those reforms in the Criminal Law which he proposed to Parliament, and was the means of passing, had proposed an extensive abolition of Capital Punishment, he might have defeated the gradual reform in the Criminal Law. Gradual changes are much more easy than very violent ones.

1558. Many of the greatest authorities in this country thought it impossible to dispense with Capital Punishment in the case of forgery?—Yes.

1559. Therefore, if a change of opinion has taken place as regards such crimes as those, may it not also take place with regard to murder?—I cannot speak of what may hereafter take place. I have endeavoured to state, as far as I could, my own opinion now.

1560. You have stated, and, as it appears to me, very truly, that juries are not so unwilling to convict as they were. Do not they now throw the responsibility to a great degree upon the Home Office?—I think that they are not so unwilling to convict now as they were, simply because the cases in which the conviction is followed by Capital Punishment are cases of murder only. When men were liable to be hung for sheep-stealing, and for crimes of a much lower degree of guilt than that of murder, juries were probably more indisposed to convict.

1561. You do not think that they feel more than they did the circumstance of the divided responsibility between them and other persons?—I have no reason to believe so.

1562. Do you think that there is a great objection to the occasionality of the punishment, death being inflicted in some cases and not in others?—No doubt absolute certainty would be a desirable thing, if you could have an absolute equality of crime, but so long as crimes are included under one definition, and are liable by law to be visited with the same penalty, and yet materially differ in their circumstances, there must be some variety in the execution of the sentence. At the same time I think that there is a reasonable degree of certainty in cases of wilful and deliberate murder.

1563. Do not you think that it would be difficult to draw the nice distinctions which you have proposed between deliberate murders and murders in the second degree?—I think that it might be difficult, but it has been done in other countries, and I think that it would not be impossible here. No doubt the difficulty would be in drawing a legal definition.

1564. Do you remember that when Capital Punishment was abolished for other crimes than murder, one of the great reasons for its abolition was the objection of the uncertainty and occasional character of the punishment?—I believe it was; and the uncertainty was then very great indeed. Looking at the paper which I alluded to just now, I see that in the earlier part of the period to which it refers, beginning with the year 1823, there were 968 persons sentenced to death, and the total number executed was 54; so that really then the uncertainty was very great indeed. But that has been removed now by limiting the punishment to cases of murder, in which, in the majority of cases, the sentence is carried into effect.

1565. (*Mr. Bright.*) I take it that nearly all the cases in which the sentence was not carried out in that year were cases not of murder?—Yes; only 12 of those 968 cases were for murder.

1566. Those 12 persons would all be hanged?—Those 12 persons would probably all be hanged. The number hanged in that year was 54; it does not necessarily follow that the 12 were all hanged, in some cases the sentence might have been commuted.

1567. (*Mr. Ewart.*) You have dwelt very justly on the sacredness of human life, as a reason for Capital Punishment for murder. Do you not think that the Government itself should set the example of maintaining the sacredness of life?—I think that it does so, by taking away the life of a person who has been the means of destroying life.

1568. Do you not think that it is rather objectionable for the same thing to be done on the part of the Government, namely, taking away the life of the criminal?—I do not think that the Government does the same thing. I hold it to be a very different thing to take away life for the purpose of robbery, or to gratify any passion, and to take away life as the result of a judicial process, and for the interest of society. In the one case the greatest danger exists to society, in the other case the taking away life throws a protection around society. That would apply to every punishment. I should say that it would be very wrong to lock up a man in prison for 20 years without any just cause, but I do not think it wrong in the case of a man who has violated the laws of his country, and whose liberty is injurious to society.

1569. Do you not think that the infliction of Capital Punishment somewhat violates the feeling of the sacredness of human life?—I think not.

1570. Do you not think it possible that one Secretary of State may admit or dispense with the punishment of death, where another Secretary of State would not do so?—So long as there are a variety of persons administering the law, you must be subject to some degree of uncertainty in its administration. If there are 15 Judges who have a discretion as to the amount of punishment which they are to apply, or who may vary in their view of the particular case, in which even they have no discretion, they may state different opinions to the Secretary of State. You will not have absolute certainty, but I think that that is the necessary consequence of having human instruments to administer the law. The same observation applies to juries.

1571. Do you think that it would be proper to exempt women from the punishment of death?—No, I think not; because I think that we have instances which show that women are capable of committing deliberate murders.

1572. Have not many persons, even in the newspapers, advocated the non-execution of women?—I dare say they have; I do not remember seeing anything upon the subject lately.

1573. Is such a practice justifiable in the eye of reason?—I do not think that it would be reasonable to exempt by law a woman from the consequences of wilful and deliberate murder; and, looking at the lowest class of women, I should apprehend that they might be made the instruments of other persons in committing murder, if it was known that they might commit murder with comparative impunity.

1574. Are you aware that it was once the law of Portugal that women should not be executed?—I am not.

1575. Are you also aware that in Portugal the execution of minors under the age of 21 was not admitted?—No; I was not aware of that.

1576. You are not aware of the fact that that could not be maintained there, and that it led eventually to the abolition of Capital Punishment, which abolition now exists?—I should think it very likely; and I should think that it would be very hazardous on that ground to exempt women by law from the consequences which attach to the crime of murder, or to exempt persons under 21. It would be very difficult to say that murders committed by either of these two classes should not be punishable with death, and to continue the punishment of death in all other cases. With regard to minors, of

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course no very young person is executed; but when you come to the age of 18, 19, or 20, you have the greater part of your army composed of such persons.

1577. (*Mr. Neate.*) There has been an execution at 14, has there not,—not in your time?—Not in modern times. I do not remember such a thing; and not in the present century, I think. 18 or 19 is the age at which most of our soldiers enter the army; and to say that no man of 18 should be liable to the penalty of death, looking to the means which he has of committing the crime, would, I think, be very dangerous.

1578. (*Mr. Ewart.*) Did not the Home Office at one time observe that the execution of women was so disfavoured by the public that they had a tendency to spare the life of women?—I am not aware. To what period do you refer?

1579. Several years ago.—Do you mean since the punishment has been practically limited to murder?

1580. Yes.—No; I do not remember any case where a woman has been found guilty of deliberate murder (putting aside infanticide, which is quite a special case,) in which the law has not been carried into effect if there were no special circumstances which were not also applicable to the case of a man. I remember several cases, since I have been at the Home Office, where a woman has been hanged. The numbers have been comparatively small, because murders are very seldom committed by women, except as accomplices with men.

1581. If you continue the execution of women, must you not sometimes delay their execution if they are *enceinte*?—Yes. I have stated that, by the operation of a humane law, if a woman is found to be with child at the time of her conviction, without any action on the part of the Crown or the Secretary of State, the execution is respited; and in that case you generally hear no more about it; the crime is probably forgotten at that distance of time, and the sentence is generally commuted.

1582. Does that seem quite consistent with the logic of the law?—No; I do not think that you can administer your law upon strict logical principles.

1583. (*Mr. Bright.*) It has not been found, I presume, that women in that state have been more given to commit murder than when they were not in that condition?—Not that I am aware of.

1584. Therefore it has not practically promoted murder?—No; I do not know that it has. The cases are very few.

1585. (*Mr. Hunt.*) May it not be a reason for not carrying out the sentence in the case of women under those circumstances that the anticipation of execution might have an effect upon the reason of the child about to come into the world?—Perhaps it may be; but it is not the ground upon which it is generally the practice to commute the sentence.

1586. But the woman learns that she will not be executed?—No doubt, generally.

1587. And care for the child's reason or health may be a cause of the commutation?—I doubt whether that reason is ever thought of. The fact is, that the law gives the respite; and I do not think that it would be possible, consistently with a due regard to public opinion, to bring a woman out for execution after she had been carefully nursed in the gaol through her confinement, and had been reported well enough to be hanged. I do not think that any sentence can be carried into effect with any good result very long after the conviction. With reference to those States in America, in which I was informed that the rule had been adopted of not executing for a twelvemonth, the

gentleman who sent me the information from America, through Mr. Abbott Lawrence, stated that he anticipated that it would be practically a repeal of the Capital Punishment. Sentences ought to be executed soon in order to produce the effect which they are intended to produce.

1588. (*Mr. Ewart.*) Seeing that Capital Punishment has been abolished in so many cases, and you having stated that if it could be dispensed with you would willingly dispense with it in all cases, do you look forward to the time when civilization and Christianity may have had such an effect that we may abolish it for the crime of murder?—No; I do not trust to civilization or to Christianity for doing that. The only circumstances in which I think that the penalty of death could be abolished in cases of murder are those in which some other punishment would have been devised equally effectual, and then I think that it ought to be substituted for it.

1589. When I said Christianity and civilization, I applied the two terms to the improvement of society, and their effect upon those who commit murders as well as upon others. Therefore, do you or not think that, looking to the improvements of the past, you may calculate on the hopes of the future, and that it is possible that even for murder Capital Punishment may eventually be abolished?—If such an improvement were to take place in the general habits and character of all classes of the people as to make murder a crime of very rare occurrence, it might be possible; but murders continuing at the rate at which they now do, and the passions of people being similar to what they now are, and moral principle and religious feeling not being materially increased in the mass of the population, my own opinion is that it would not be safe to dispense with Capital Punishment until you can assure yourself that you have some other punishment which can be substituted for it which will have an equal effect.

1590. Then you do not think that society has advanced so much in the last 30 years, though Capital Punishment has been so much remitted?—Yes; I think that there has been an improvement; I think that there has been a diminution in crime generally; not always comparing one year with another, but going back for 20 or 30 years. I think that crime has diminished, owing to various moral agencies which have been at work, and which have had a great influence upon the population.

1591. May not those moral agencies go on?—I have said that if they should, and if they should produce the result of the absence of murders, then Capital Punishment would not be carried into effect. If there were no murders there should be no executions.

1592. Would you go back and revive Capital Punishment in cases where it has been abolished?—I think that I have said distinctly that I would not do that.

1593. Must it not become more difficult, from year to year, to convict in cases of poison, in consequence of the advance made in chemistry?—No; I think that the advance made in chemistry rather gives increased facilities for the detection of poison. I think that poisoning cases are rather diminishing, owing to the apprehension that they will be discovered.

1594. There is a return of cases in Scotland which has been made on the motion of Sir Colman O'Loghlen, to which I beg to call your attention?—I wish to observe that what I have said with regard to the law applies exclusively to England.

1595. I think you will find that within five years there have been 11 persons convicted of murder in Scotland, and that out of those only two have been executed?—It appears by the return that out of these

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cases two persons only were executed. I do not know what these cases were. I have no doubt that I can obtain all the information with regard to them.

1596. Do you think that it is worth while to retain Capital Punishment when only two persons out of 11 are executed, and where, therefore, it must have so very small an effect upon the population?—It depends upon the circumstances of the crime. The law of Scotland is very different from our law.

1597. Do you not think that there is an analogy between those occasional executions and the occasional executions which took place for forgery, and so on, until at last they were given up altogether?—I do not know the circumstances of these cases, but I should say, taking the whole of the country together, taking England and Scotland generally, as I said just now, there is a reasonable certainty that a person guilty of wilful and deliberate murder will be executed. I should be inclined to think that several of these cases were cases of women for infanticide; but I can ascertain that. There have been frequent cases of that kind in Scotland.

1598. However, in five years only two persons have been executed in Scotland. Has society been less safe since that extreme rareness of execution?—I do not know that it is an extreme rareness of execution. I should like to know how many of these cases were cases of child-murder. I do not know how many of the persons were found guilty of wilful and deliberate murder, such as would be subject to execution in this country.

1599. (*Chairman.*) I understand that with reference to those Scotch cases you do not give any decided opinion upon them, inasmuch as you do not know the merits of each individual case?—I have not had my attention at all called to this return, and I am not able to give any explanation of the cases in which, or of the circumstances under which, capital sentences were commuted. In Scotland, when a memorial in a case of murder is received, the practice is always to refer, not to the Judge who tried the case, but to the Lord Justice Clerk, who is the head of the Criminal Court. He communicates with the Judge who tried the case, and the Lord Justice Clerk reports upon the case.

1600. (*Mr. Ewart.*) Capital Punishment has been abolished in Russia since the time of Catharine II.?—Yes, for certain crimes—not for political crimes.

1601. But for what I may call civil murders?—Yes, I believe so.

1602. It has been said that though the Russians did not execute, they inflicted such punishment by the knout that death ensued?—I do not know what the criminal code of Russia is. I see a paper which has been laid before the Commission, and which states the general law of Russia in these respects.

1603. You stated that in no great country had the punishment of death been abolished?—Just so, and in Russia it has by no means been abolished, for I find a long catalogue of crimes, coming down to being a member of a Secret Society, which are punishable with death, and my argument is that as probably that crime is looked upon as the highest crime in Russia, they have attached the highest penalty to it, as, I presume, being in their opinion the most deterring.

1604. Murder there has not the punishment of death inflicted upon it?—No.

1605. (*Mr. Hardy.*) A breach of the Quarantine Laws is capitally punishable?—Yes, and a great many other offences. Looking at this paper, I presume that the Russian Government regard crimes against the State as being the highest crimes, as they punish them with death.

We act on the same rule. We consider murder and treason to be the highest crimes.

1606. (*Mr. Hunt.*) With regard to infanticide, have you any statistics showing the increase or decrease of that crime; I mean by "infanticide," the killing of a newly-born child?—I have nothing since Mr. Cox's Return.

1607. His first Return is for 1861 and the first part of 1862, and his second Return is during the years 1862 and 1863. I rather want, if possible, to go back to the time when women were hanged for child-murder.—I have not any information about that.

1608. I wish to ascertain whether the cessation of the hanging of women for child-murder has had any effect upon the number of infanticides in proportion to the population?—I will endeavour to procure the information if it can be obtained from the Home Office.

1609. You stated that the last case of a woman being hanged for this crime was in 1849?—Yes.

1610. With regard to infanticide, we have had it stated here by those judges who have been witnesses, that the great difficulty in these cases is in proving that the child had actually a separate existence when its life was destroyed. Do you think that it would be possible to make a new offence by statute for the case of a child who was destroyed either during or immediately after birth, so as to get rid of that difficulty, making it immaterial whether the child was killed after it had breathed, and before it was separated from its mother, or whether it was wholly separated, but affixing a heavier penalty than now attaches to the concealment of birth?—There is now the case of procuring abortion, which is severely punishable.

1611. That is procuring the destruction of the fœtus before birth?—Yes.

1612. A common case now is of the child being found with a ligature round its throat, or injured in some other way, and the medical witness not being able to say whether it was done before the child was wholly separated from the mother. Do you think that it would be possible to make it a distinct offence to destroy a child either immediately before or immediately after birth?—I think that it would be difficult to make such a distinction, and it might be open to the same objection as was suggested before. If you draw a line of demarcation below which the taking away of the life of a child is not murder, and beyond which it is; it is almost impossible not to anticipate the mother's doing the act before the time when it is capital, if she has reason enough to do it.

1613. Do you think that the punishment of two years imprisonment, which I think is the maximum punishment for concealment of birth, is a sufficient punishment for the child being destroyed by the mother during or immediately after birth?—No, I do not think that it is. I think that if there is good ground to believe that life was taken away wilfully although there is no legal proof of it to justify a jury in finding the fact, it is not a sufficient punishment; but at the same time, I do not think that the judges generally go to the full extent of the law as regards that punishment, because in those cases where the woman is put upon her trial for murder, and is found guilty of concealment of birth, my impression is (I speak from recollection) that the sentence is very seldom one of two years imprisonment. Therefore as you must leave a discretion with the Judge, I doubt, whether any alteration in that law would have much practical effect. The fact is that in these cases there is no doubt that both in the Judge and in the jury there is a great sympathy with the woman. She is believed to be, and perhaps

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upon good grounds, a person who has suffered an injury, she has been seduced, and there is a great deal of feeling for her, and it seems to be thought that her offence requires no very severe punishment. But if you ask me whether I think that it is a punishment adequate to the crime, I think not, but a good many considerations must enter into that question.

1614. A woman is at a great advantage by being tried by both Judge and jury of the opposite sex. I suppose that there is a feeling of compassion from the stronger sex towards the weaker ?—I can hardly say what the effect would be of a female jury ; it would depend very much upon the class from which they were taken.

1615. With regard to the interval which now exists between the sentence and execution, have you anything to say on that subject. It is much longer than it was some years ago ?—I would not suggest any change in that respect. It is an uncertain interval. It varies in different places. The day of execution is generally a day fixed by custom, a certain day in the week after two or three Sundays subsequent to the termination of the assizes ; and in the case of Yorkshire and Lancashire, where the assizes last a long time, if a person is convicted early at the assizes there is a considerable interval before the execution takes place, but I do not think that it is generally speaking too long a time. It no doubt subjects the Secretary of State to much more solicitation for mercy than was the case before, but I do not think that that is a consideration which ought to lead us to shorten the period. I think that the law is a humane one, and gives time for preparation for another world, which I think is right, and it also affords time, where there are any circumstances which ought to lead to the interposition of the royal prerogative, for a full examination of those circumstances.

1616. With regard to the solicitations on behalf of persons condemned to death, do you find any difference as to the number of those solicitations, whether the person condemned is a foreigner or a native of this country ?—As a general rule I should say not. There have been two remarkable cases lately, which may be regarded as exceptions to that rule. In one case, as I have already said, there was not a single solicitation ; in the other case the solicitations were extremely numerous, coming from different parts of Europe.

1617. In the case of foreigners you find that memorials come from other parts of Europe ?—I should not say in the case of foreigners, for I never remember any other case in which it has taken place but the case of Müller ; a good deal of political feeling entered into that.

1618. As a rule should you say that as much interest is taken to save foreign culprits from the gallows as to save English ?—I think so. I do not think that there is any feeling here of difference.

1619. Is that the result of parties being put in motion by the friends or relatives of prisoners here, or of persons taking the matter up from humane motives, or from having views on the subject of Capital Punishment ?—I think that most of the solicitations come, not from friends and relatives, but from persons taking an interest in the matter. I do not say that they are opposed to Capital Punishment, because many of these memorials come from persons disavowing any endeavour, or any desire to abolish Capital Punishment; many of them are volunteers. They read, perhaps, a very incorrect report of the trial in the newspaper, and they probably think that there are circumstances which ought to be attended to ; sometimes there are, but very generally there are none.

1620. (*Mr. Neate.*) You have spoken of the fact of political crime in Russia being subject to Capital Punishment as a proof that the Russian Government consider it the most deterrent punishment ; but

is there not in all countries, with reference to political crime, a reason why Capital Punishment is the only deterrent; for mere imprisonment could not be effectual, because if the party for whom the offender has committed the crime comes into power his imprisonment is converted, not only into liberty but it may be into power?—It is possible that that may be the case in some countries.

1621. In every case, if you imprison a man for a political crime, if the parties for whom he conspired come into power, not only has he liberty but he is put in possession of power and office. That has very often happened to political offenders who have been imprisoned. Are you aware that the punishment of death for political crimes has been wholly done away with in France?—What do you mean by political crime? How do you define it? Is not treason in France punishable capitally—an attempt upon the life of the Emperor?

1622. In the early part of your evidence you stated that your attention had been drawn to the fact of very few murders being committed by what are called the criminal classes?—I think I did not.

1623. If you go through the statistics of the last few years it will be found that very few murders are committed by the criminal classes. You, I understand, attribute that to the fact of a man who is either committing a burglary or a highway robbery, making a distinction in his own mind between Capital Punishment and the punishment next to it, and abstaining from the crime which subjects him to Capital Punishment?—It is possible.

1624. Do you not think that the absence of any great murder committed by the criminal classes may be referable to the humanising effect of the present system of treatment in our prisons?—I should doubt whether it had any great effect. You mean that if a man had been under sentence for some previous crime he would come out so much better a man that he would go on in a criminal course of life, but would not commit murder. That never occurred to me.

1625. Do you not consider that the criminal classes of this country are a much less ferocious set of persons than the criminal classes of other countries?—I have no means of instituting a comparison. What do you mean by the criminal classes? Do you mean professed burglars? I think that they act very methodically, and reason as to the consequences of the crime; they act with great coolness and deliberation; they are not under the influence of passion, and I think that it is just upon that class that the present law has its deterring effect. They will accomplish their purpose with as little risk to themselves as possible, and if they can avoid taking life they avoid the risk of being hanged.

1626. Do you not think that there is a reluctance to take life in this class of persons?—I doubt very much whether, if they could take life without risk, they would not very often be tempted to take life in order to destroy the possibility of evidence against them.

1627. In considering the circumstances under which mercy should be extended, is not one of the great difficulties in considering whether there is or is not that weakness of intellect which incapacitates the offender from having a deliberate motive?—That was one circumstance which had to be taken into account in the case which I have alluded to of Celestina Sommers. If I remember rightly, that was the ground on which the commutation took place. I had great doubts afterwards whether it was right, but very soon afterwards she was removed to a lunatic asylum and died a lunatic, which confirmed the evidence which had been given that she was not a person in the full possession of her

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faculties. At the same time, I am not at all prepared to say that she was not perfectly responsible for her actions.

1628. (*Chairman.*) I understood you to say that you were not unfavourable to a change in the law with regard to the classification of murder?—I think that it would be extremely desirable if you could have the definition sufficiently clear and precise to distinguish accurately as to the classes of cases. I think that, as it has been done in other countries, it might be attempted and probably successfully, in this.

1629. (*Mr. Waddington.*) There would be no doubt, would there, in excluding unpremeditated murders; the only difficulty would be when you came to the exact line. When a murder was really unpremeditated there would be no difficulty in putting it into the second class, but the difficulty would be what degree of premeditation should put it into the first class?—No doubt that is the great difficulty.

1630. That must be a question undoubtedly for the jury. In some cases there would be considerable doubt and difficulty caused by it if it were not; but there would be a very large class of cases where there would be no difficulty, namely, cases of murder where there was sudden provocation by violent passion, but not sufficient to reduce the crime to manslaughter?—That class of cases, I think, might be clearly distinguished from the others.

1631. There also would be no difficulty in putting into the first-class all murders where there was an intention to kill, and which accompanied certain felonies?—Just so.

1632. There would be no occasion for premeditation in those cases; all that would be required in those murders, in order to put them into the first-class would be the intention to kill accompanied by a felony, either commenced, or actually perpetrated?—That might be so.

1633. (*Mr. Hunt.*) Supposing that you had a classification of murder into murder of the first and second degree; would it be possible, in your opinion, to allow the jury to bring in a verdict of murder and to leave it to the Judge to say in which class it fell?—I do not think that it would be more necessary or desirable than now with regard to doing away with the legal distinction between murder and manslaughter. Practically the Judge does determine, not absolutely, because the jury have the power of finding what verdict they like, but they take their law very much from the Judge as to the distinction between murder and manslaughter; and I think that probably they would do so in these cases, being themselves the judges as to the facts with regard to premeditation.

1634. (*Chairman.*) Is there any change in the law, such as you have now suggested, which you would be prepared either to recommend to the Commission, or to bring into Parliament?—I can hardly say at once that I should be prepared to bring it in, without communicating with others, but the subject is well deserving consideration, and if the result of the inquiries of this Commission should be to lead them to recommend such legislation I should not be at all unwilling to endeavour, with the assistance which I have, to give effect to that recommendation.

1635. Can you give us any opinion upon public executions?—I have thought a good deal upon that subject, and I think that there is a growing feeling in favour, I will not say of their being private, but of their being carried into effect within the walls of the gaol. There is a good deal of difference of opinion upon that point, and many people think that it would be undesirable to have any execution except a public execution; but certainly the scenes which take place at these executions are those which one would wish, as far as possible, to avoid. Since

the last discussion in Parliament upon the subject, I have seen the information which the Government have obtained from all our Australian colonies, and as in I think all of them the punishment of death extending by law to a greater degree than it does here, and attaching to other crimes than murder, is carried into execution within the walls of the prison to the entire satisfaction of the community, I do not see why it should be impossible to attain the same result in this country. I think that the circumstances should be such as to avoid the attraction of any crowd, and that means should be taken to ascertain by witnesses, that the execution is carried out, but that there ought to be none of those external indications of its going on at the moment which would be sure to attract a crowd, and to produce nearly all the evils which exist now from a public execution.

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1636. (*Mr. Ewart.*) Would not the people read in the newspapers almost the same details which are exhibited now before a crowd?—It would be, I think, quite necessary that there should be representatives of the newspapers present if they chose to go there; but the public would only read the details of the execution. What would be avoided would be the enormous crowd of persons which are collected together of the very lowest class, which produce, no doubt, scenes which are very much to be deprecated. I am not at all prepared to say that some good effect may not be produced upon many persons present. Happily I have never witnessed an execution, but I have been told that at the moment of execution there is great solemnity even over the crowd which has been behaving in the most offensive way immediately before it. I however, think that it would be an undoubted gain if those scenes could be avoided, and if at the same time the public could be quite satisfied that the sentence was properly carried into effect, and that could only be done by certain persons being present, whose presence would quite satisfy the public upon that point. As to the deterring effect of the execution, I have seen different opinions expressed upon that subject. I do not myself believe that it would make any difference whether the execution was public or private in the deterring effect of the punishment upon the criminal class.

1637. (*Mr. Hunt.*) Are you aware whether these scenes to which you have referred occur in any other place than the metropolis?—Yes; to a certain degree they do, but not to the same extent, because there is not so large a proportion of that class elsewhere. But wherever there is an execution a great crowd is collected, and certainly comprising the worst class of the population. The scenes here, however, are worse because a larger crowd is collected, and in London hitherto (it is to be altered now) the executions at Newgate have been on a Monday morning, and Sunday being an idle day people have collected on Sunday and have been there the whole Sunday night. The present Sheriffs, I believe, have taken that matter into consideration and have determined that the executions shall take place, during the time that they hold their office, on a Wednesday instead of a Monday, thinking that that will diminish the crowd collected on the occasion.

1638. (*Mr. Hardy.*) In some places the execution takes place without giving notice of the time.—So it is said, but the day of execution is fixed by custom, and everybody who knows what that custom is must know the day. The hour, perhaps, may not be known. In France that, I believe, is the case. There the executions are public, but it is never known when the execution will take place, either by the criminal or by other persons, till the night before, and the preparations are made rapidly, and there is no such public notice in Paris as to enable a large crowd to collect as they do here.

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1639. (*Mr. Neate.*) It is at six or five o'clock in the morning?—There is no fixed hour and there is no fixed day.

1640. (*Mr. Hunt.*) Have you considered what precaution should be adopted to satisfy the public that the execution has really taken place, supposing it to take place within the walls of the prison?—Not in detail, except from looking at the Australian arrangements, and the same thing takes place in America. The letters which I have, as to America, state that a certain number of persons are required to be present, and that the regulations there existing (and I believe that the same is the case in Australia) completely satisfy the public that the execution takes place, and that it takes place in the manner which was intended by the law. I think that the best security would be admitting the representatives of the newspapers—not alone, but with other persons. I think that publicity is absolutely essential, but whether that publicity could be obtained without the spectacle being in an open street, with a multitude of spectators, is the question which we have to determine, and I am inclined to think that it might be from the experience in Australia and America.

1641. (*Mr. Waddington.*) In Australia they have a coroner's inquest?—They have it in one colony; but certain official persons must be present.

The witness withdrew.

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HILARY NICHOLAS NISSEN, ESQ., examined.

1642. (*Chairman.*) You have been one of the Sheriffs of the City of London?—I have.

1643. For what year?—For the years 1863 and 1864.

1644. I believe that you can give us some evidence on the subject of executions?—I shall be very happy to answer any questions which the Commission may put to me.

1645. First of all, what are the scenes which take place outside the prison?—You refer to the conduct of the mob assembled to witness an execution?

1646. That is one point?—I think that it is of a very rough nature generally. My opinion is that public punishments have no deterring effect at all upon the people; that is to say, the exhibition of a man being hanged.

1647. What causes you to come to that conclusion?—I think that the whole punishment of death is deprived of its solemnity by the manner in which the execution is conducted before a large number of people.

1648. Do you mean from the conduct of the persons who are there to witness it?—Not so much from that as from the entire want of any solemn preparation for a man being launched into eternity. A public execution in this country is (to use a word which is, perhaps, hardly applicable) too prosaic a matter altogether.

1649. Then am I to understand you to mean that you would have the bells toll? Do they toll now?—I do not think that the bell of St. Sepulchre does toll now. I have been present at the execution of seven men during the time that I was in office, and on no occasion did it appear to me to be surrounded with any solemn preparation at all, such as to exercise an influence on the mob who came there to see the man destroyed.

1650. What would be the solemn preparation which you would

suggest?—I cannot make any suggestion. It appeared to me to be deprived of everything of the kind.

1651. Do you mean the absolute gallows?—I refer as one thing to the manner in which the scaffold is brought out. It is drawn out by one or two horses from the prison-yard, and put together by a body of workmen, carpenters, and others during the night. Then the erection is left in the front of the gaol in the summer time, of course, for many hours; but in the winter, for at least an hour before the execution; by daylight. The gallows is the subject of very coarse remark, and you may say almost of jest, by all the people who are assembled; at 8 o'clock the man about to be executed is brought out, and he is only before the public for two or three minutes before he is hanged, and he remains there hanging for an hour in the sight of the public without any other person upon the scaffold, and without any appearance whatever of any solemn preparation by the executive. Next, the executioner comes on the scaffold, dressed in his ordinary way, a dirty wide-awake hat on and a shooting jacket, and he takes out a pocket-knife and cuts the cord by which the body is suspended, and it drops down. The executioner stands there, and hears all sorts of remarks passed upon himself, and the whole thing appears to me rather to be regarded as a matter of entertainment by the public.

1652. Assuming that Capital Punishment is retained, you would prefer that it should be carried out privately, instead of in public?—I think that that is hardly the conclusion which I would come to immediately upon the subject. If no better mode of exercising a deterring influence upon the mob could be come at in a public execution, I certainly would not execute a man in public as he is now executed. I would then execute him in the prison-yard.

1653. I understand you to say that you have not made up your mind as to what solemn preparation should be made?—Not at all; but if executions are to be continued in public, I think that the authorities should surround the matter with something more solemn than is now the custom.

1654. (*Mr. Bright.*) Do you think that there should be more clergymen present?—You can hardly take that as the purport of my meaning. I think that there should be more preparation, and that it should be differently conducted. If we hear of an execution in Spain, or in other places, we find that it is very differently conducted from what it is here.

1655. They have a procession of priests, and so forth?—Yes.

1656. (*Mr. Waddington.*) You would have a procession of the civic authorities in costume?—That is so to a certain extent now. I always attended in robes.

1657. Did you appear in public?—We do not go upon the scaffold; but we go to the foot of the scaffold.

1658. (*Mr. Bright.*) The public do not see you?—No. A procession is formed inside of the gaol, but, of course, that has no effect whatever upon the crowd. When the criminal goes upon the scaffold, he is, I believe, invariably, from what I have seen, attended by the chaplain, the Rev. Mr. Davis. With the exception of himself and the warder who goes up with the criminal, there is no other person upon the scaffold except the executioner. The manner of Calcraft, the executioner, is very rough, and the matter is the most practical thing which you can imagine.

1659. I suppose that if he was hanging a dog he would be just the same?—Just so. Unless a person has witnessed an execution, he can

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form no idea of the utter practical way in which the thing is done. There is no solemnity at all.

1660. (*Mr. Ewart.*) Then a private execution would not do away with your objections altogether, because there would still be the same want of solemnity?—I think that that should form a part of the alteration.

1661. (*Mr. Bright.*) Do you not understand, as having to give your countenance to this dreadful business, that the object is to make it something shocking and revolting to the thousands who are assembled?—Yes; but it is not so.

1662. Do you think that it would be made more so, if there was a great procession of people, and if the convict was made the centre, as it were of an exhibition almost theatrical?—The word "theatrical" would hardly apply to the view which I take of it.

1663. If he was made the centre of a great ceremonial?—I think that the predatory portion of the public who go to witness an execution have an idea that the man having been condemned, the sooner he is put out of the way the better, without any reference to the influence upon the minds of the people who come to see it.

1664. Do you take it to be brutalising in its influence upon them?—No, I cannot say that I do, but I think that it creates a feeling of total indifference to hanging.

1665. Did you ever see a man hanged before you were sheriff?—No.

1666. What was the effect upon you when you first witnessed an execution?—It, perhaps, was not the same upon me as upon many others who did not take the same trouble with it. When I was elected to the office of sheriff, I made up my mind first, that I would sit out the trial and satisfy myself that the man deserved the punishment; and secondly, that I would never be present at the execution of a man unless I heard him confess the crime. In every case that was thoroughly carried out.

1667. What was the effect upon you? Some people faint at the sight of blood, and some get sick at the sight of some other calamity?—The effect, perhaps, was less upon me from the peculiar nature of the first execution which I witnessed; it was the execution of the pirates.

1668. Was the execution of five men less potent than the execution of one would have been?—Not at all. The effect of the execution of those men upon my mind was, that I felt it to be very well deserved, and therefore I witnessed it without very much sympathy or feeling; if a woman had been hanged I should not have gone to the execution.

1669. Mr. Davis told us that he was very ill for three days after the first execution which he witnessed, but that now after being there for so many years, familiarity with these scenes had removed that feeling. Do you suppose that that is the case amongst persons in the crowd, those who are frequently in the habit of attending executions, that they have very little sense of the crime?—I do not think that the crowd who come to see an execution reason at all in that way.

1670. They come for the excitement?—They come in the first place for the excitement, and they come to see what sort of punishment hanging is, but the circumstances which attend the execution take away, I think, from the poorer class all idea of its being a severe punishment. I have no doubt that there are many people who come to see an execution, whose lives are so wretched, and who live in such a constant state of misery that they would rather pursue any particular crime to murder, if necessary, if it lessened the chance of their crime

being discovered, and thus run the risk of being hanged than of being transported for many years.

1671. Is that merely an opinion which you have formed in your own mind, or have you any instances to illustrate it?—I have followed it out in my own mind. Last year I sat out the whole of the sessions, and I witnessed an exhibition of so much misery that I am quite certain that the punishment of death has no terror at all.

1672. For the poorest and the most miserable people?—Yes.

1673. (*Mr. Waddington.*) They themselves thought that their life was not worth having?—Not that; but men who had lived a constant life of wretchedness for many years with drunken wives or starving children, when at last they find some great result is to be attained by crime do not hesitate to take life, because the punishment of death has no terror for them.

1674. (*Mr. Justice O'Hagan.*) Do you think that they would have a greater fear of penal servitude for life?—Yes. A man who has spent a long period of his life in misery and wretchedness shows no desire to live; and a man who contemplates any great crime, and fancies that he will be punished for some years with extreme severity is very likely to be far more deterred by such punishment than by the prospect of being hanged.

1675. (*Mr. Hunt.*) Have you ever visited a person whose sentence has been commuted from death to transportation for life?—Yes; two of the pirates, and a woman named Mary Hartley.

1676. What did you find to be their state of mind?—As regards the pirates I could not discover, they did not appear to be particularly elated by their escape from the gallows.

1677. Could you communicate with them?—We had an interpreter. With regard to Mary Hartley she took the matter in the most indifferent way.

1678. What was the case of Mary Hartley?—She killed a child. She put the child up the chimney. I think that the great evidence which convicted her was that she had written a letter before the child died stating that it was dead.

1679. And her sentence was commuted?—Yes; she was transported for life.

1680. Did you announce the commutation to her?—Yes. A letter came to me whilst I was at a public dinner, and I went down to Newgate, and the Governor took me into her cell. She had already known of the commutation an hour before that, but she did not exhibit any pleasurable excitement.

1681. (*Mr. Justice O'Hagan.*) Had you seen her a week before you announced the commutation?—Yes.

1682. At that time was she anxious to have her life spared?—Yes.

1683. (*Mr. Hunt.*) When the commutation came did she seem stupified?—Yes, she seemed deadened. I was certain that she had been brooding over the probability of her execution.

1684. (*Chairman.*) Then am I to understand you to say that in that case the greater punishment, so far as she individually was concerned, was to transport her for life than to hang her?—I think so.

1685. (*Mr. Hunt.*) Do you think that she would rather have been hanged?—I think that she would at the time. She had been brooding over the probability of her being hanged for several days; and she was utterly prostrated when I saw her, and told her that she was not to be hanged.

1686. And you think that it was a disappointment to her?—I should imagine so at the moment. She was very indifferent.

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1687. (*Chairman.*) Her feelings were so deadened, that she scarcely knew what she did?—Perhaps so.

1688. (*Mr. Justice O'Hagan.*) But she had before that expressed an anxiety to live?—Yes; to have her life spared; she was very earnest.

1689. (*Mr. Bright.*) Have you in your position as sheriff seen much of any other prisoners except those under sentence of death?—Yes. I took the opportunity whilst I was in office to go round all the metropolitan prisons.

1690. You have objected to certain things, but you have not proposed any specific remedy. From your own experience and your thinking on the subject, are you of opinion that Capital Punishments themselves are not necessary?—I think that they are not necessary upon this broad principle, that Capital Punishment has no deterring influence at all upon the lower classes.

1691. You mean in comparison with other punishments?—Yes. I do not think that it would be possible to suggest any punishment which should be commensurate with the crime of murder without exciting a feeling of sympathy in favour of the criminal after two or three years severe punishment. Humanity in this country works to a great extent; and I think that if a man was set to work in chains, or to work up to his middle in water, in a year or two his crime would be forgotten.

1692. That is to say if he was tortured?—Yes.

1693. But with regard to imprisonment and constant labour, such labour as was suitable for his bodily powers, that is done now in the case of our extreme secondary punishments?—Yes.

1694. And in other countries?—Yes.

1695. Therefore there is no reason why it should not be done in England?—Not at all. I would venture to suggest, as a remedy for Capital Punishments in public, that the criminal should be executed in the prison yard; and to avoid the chance of the poorer classes thinking that any particular man had not been executed, I would admit the public to a certain extent—those who chose to assemble at the gaol at an early hour in the morning.

1696. But those persons would not be of the criminal classes?—I would let the space be filled with those persons who got there, say at four o'clock in the morning, and then the gate should be shut.

1697. You would thereby limit the beneficial effect of the exhibition; the general argument is, that the exhibition is deterrent; but you would limit it to a smaller number?—I do not think that it is deterrent at all; but I would let in all classes, because the population at large should not think that the execution had not been carried into effect.

1698. But after all you think that Capital Punishments are not necessary, and you do not insist upon them?—Not at all. I tried during the whole of the year to make up my mind upon the subject, and I never could come to the conclusion that it was necessary to hang a man, looking always to the fact that the execution should be taken as having a deterring influence—upon that ground only.

1699. You think that, on the ground of vindictiveness, if that were a proper ground, it might be continued?—Yes.

1700. But not upon the ground of its benefit to the public?—Exactly.

1701. (*Mr. Justice O'Hagan.*) Do you think that it would be more deterrent if the execution were in the yard?—Not at all. I have read a great many essays upon the subject, and that is my opinion.

1702. (*Mr. Ewart.*) The people are hardened?—It is not that they are hardened; but there is nothing in it; it is so practical.

1703. It has no solemn effect?—None at all.

1704. (*Mr. Bright.*) You cannot in two or three minutes get up a solemnity?—No.

1705. (*Mr. Hardy.*) Do you mean that it is not deterrent upon the crowd, or that it is not deterrent upon those who think of it?—I mean upon the crowd. I apprehend that the object of a public execution is for it to have an effect upon those who come to see it.

1706. Taking the Punishment of Death itself, do you not think that it deters persons from committing crime?—I do not think so. I have been present with the Ordinary of Newgate upon every occasion when we have gone to communicate to any particular prisoner that he or she was to be hanged, and I never saw any of that stunning effect which people out of the prison would imagine that it would have.

1707. (*Mr. Hunt.*) I suppose that they knew it beforehand and that your communication was only as to the time?—Yes.

1708. They were well aware beforehand that they were to be hanged?—Yes; it was the same in the dock when they were condemned.

1709. (*Mr. Waddington.*) When the Judge's sentence was passed upon them?—Yes.

1710. (*Chairman.*) You alluded to those seven prisoners whose execution you have witnessed?—Yes; one danced out of the dock. The condemnation of the pirates was a very solemn matter, it was late in the evening and the court was quite full, and the last man (Lopez I think was his name) made all kinds of gestures and danced out of the dock; at the execution he was the last man who was put up on the scaffold, and he nodded and laughed at the crowd and was a man whom they all cheered.

1711. (*Mr. Bright.*) Was he cheered by a good many people in the crowd?—By all on that side where his face was to be seen.

1712. He was supposed to have shown more courage than the others?—Yes; more pluck they call it. One man, a black man, swooned.

1713. (*Mr. Ewart.*) Is it not one objection to the Punishment of Death that it has a different effect upon different individuals, and that one man may swoon as you say and another may dance, and therefore that it must be very uncertain in its effect?—I think that in the case to which I alluded, in which the man danced, he was a man who belonged to the class of Malays and others who look upon death with very great indifference, and who hold life very cheaply.

1714. (*Mr. Bright.*) The question upon which we want to know your view, is not so much the effect upon the man to be hanged, as the effect upon the public, and especially upon that class who are most liable to be led to the commission of these crimes, and your opinion is distinctly that the deterring effect is of no value?—None at all; or rather that it has no deterring effect, that is the way in which I should put it certainly. In two cases, those of Devine and Brickhill, neither of the men expressed any desire to live; in one case, that of the man named Brickhill, who stabbed a woman, I think the man was mad.

1715. But nevertheless he was hanged?—Yes; his madness was very methodical. Those men were very young men, I do not suppose that either of them was 25; they were both men of small muscular power, and on each occasion of those men being hanged, they stood forward to be pinioned, and walked without any assistance up to the scaffold and placed themselves under the beam just as a man would do in some exhibition of gymnastics, there was not the slighest tremor or fright.

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1716. How many prisoners are there generally in Newgate ?—About 150.

1717. Have you had any opportunity, from communication with the other prisoners, of ascertaining what is passing in their minds with regard to the execution of any prisoners there ?—No.

1718. Of course on the morning when any man is to be hanged, every person in the prison knows it ?—Yes.

1719. With regard to other gentlemen who have held the office of sheriff, have you any idea that your views with regard to the non-deterrent effect of Capital Punishment are entertained by them ?—Not at all ; I have not had any conversation upon that subject. The past year was rather an exceptional one as regarded executions, because the men from the ship swelled the number very much.

1720. Do the men generally seem to receive whatever attentions are paid to them by the clergyman, or by the Governor, with a certain amount of thankfulness and good feeling ?—I think that it is very hard to divest the mind of the idea that there must be a large amount of hypocrisy.

1721. That is with regard to their religious profession ?—Yes ; a man who has, during a large part of his life, committed crime, cannot become really changed in a few days.

1722. Although that may be your experience during your tenure of office, is it not the fact that many of those persons have never been under the law before ?—Yes, I think that in two of those cases last year it was so. I believe that the man Brickhill, who was in love with a young woman, and because she rejected him armed himself with a carving knife and killed her, had passed through a proper and good course of life up to that time ; the other man who was hanged, a young man named Devine, I think, had been in prison once or twice, but for very trifling offences ; he was poor, and they were just those trifling offences which are committed by the poorer classes.

1723. (*Mr. Waddington.*) That man was convicted for murdering an old gentleman on the highway, was he not ? whom he knocked on the head with an iron bar ?—Yes ; but I do not think that his intention was to kill him.

1724. His intention was, I suppose, to disable him ?—I do not think that the whole of the evidence in that case was published, I do not think that he intended to kill him ; but he did kill him. That was rather a singular case of robbery, he had been in a public house late at night and he had seen this old gentleman exhibit some money, and he said that at the time he was starving ; he followed him out, the old gentleman went to a hoarding on the opposite side of the street ; Devine took a poker from the tap-room, struck him on the head, and then put his hand in his pocket, but the poor man fell down with the back of his head upon the kerbstone, and I have no doubt that that caused death and not the blow from the poker.

1725. (*Mr. Hunt.*) He was a person in whose employ the prisoner had been ?—Yes.

1726. (*Mr. Bright.*) Is there any other statement which you wish to make ?—No ; I shall be very happy to answer any further questions. The whole of my feeling during the past year has been that Capital Punishment has no influence.

1727. (*Mr. Ewart.*) And you have made up your mind on the subject from what you have seen ?—Entirely from what I have seen. I think it very objectionable.

The witness withdrew.

HENRY AVORY, ESQ., examined. *H. Avory, Esq.*

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1728. (*Chairman.*)—You are the clerk of arraigns at the Central Criminal Court?—I am.

1729. And deputy clerk of assize for the Home Circuit?—Yes.

1730. Have you been engaged for the last 25 years in matters connected with the criminal law?—I have, since I was 15 years of age.

1731. I believe that you have been brought up to the profession of a solicitor?—Yes.

1732. You have, no doubt, given the subject of the administration of the criminal law considerable attention?—It has been forced upon me by my occupation, and in connection with it.

1733. From attending at these various Courts you have no doubt heard many trials for murder?—Yes, a very large number.

1734. In fact all the trials which have taken place?—I cannot say that I have heard all, but if I have not heard the whole of every trial, I have heard some portion of every trial which has taken place in the Central Criminal Court, or on the Home Circuit in the last 20 years.

1735. Your duty is to attend the Court every day?—Yes.

1736. What views have you arrived at with regard to the classification of murder, whether it could be differently classed from what it is now, in degree?—I think that it is a most desirable thing to be done, if it be possible; the latter branch of the answer is the one upon which I have doubts. I have tried in vain for a fortnight to produce a definition of murder which shall be satisfactory to myself, that is to say that in every definition which I have been able to frame after considerable reflection, upon further examination I have found that I have either included or excluded something which I did not desire to be so included or excluded. Because it varies so very much, looking at all the forms of death by which our nature may be overcome, it is almost impossible as it seems to me to provide such a definition as shall ultimately and permanently be satisfactory; I think that you might approach it to a considerable extent. There is the following case of murder, for instance, to which I would allude, say two people consenting to commit suicide together, perhaps A. has urged B. to join him in committing suicide, and they both jump into the water, and the one who has been urged to do it happens to survive, he is guilty of the murder of the other. I do not know in what class they should be put. If I had to deal with it I should hardly call it murder at all, and yet the law holds it to be murder, and the punishment of death attaches to it.

1737. (*Mr. Bright.*) Would the law hold it to be murder if the one merely agreed to commit suicide with the other, and if there was no proof that he had urged the other to commit suicide?—If it should be proved that the two agreed to commit suicide, and if it should be further proved that the one who survived was not the mover of the act, he would still be held to be guilty of murder.

1738. (*Mr. Waddington.*) It would be upon the ground that he was present, aiding and abetting the act?—Yes.

1739. (*Mr. Bright.*) Is not that a very rare case?—It has happened within the last six years.

1740. (*Mr. Hunt.*) It is not uncommon in France, I believe?—No.

1741. (*Mr. Justice O'Hagan.*) Can you give us the form of definition which you consider best?—I was so much in despair that I think I destroyed the forms which I had written.

1742. (*Mr. Bright.*) Have you examined any of the definitions which have been established by other legislatures?—Yes; and there is not one which is satisfactory to me.

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1743. Which have you examined?—I have examined the whole which appear in the papers before the Commission.

1744. Have you examined those from the United States?—Yes; for instance, they do not define the time during which the premeditation is to exist.

1745. (*Mr. Waddington.*) Instead of considering whether you can make a perfect definition of murder, will you favour us with any improvements which you think could be made in our present definition?—First of all, nobody would seek to take out of the class of murder every wilful intention to kill from a foregone design. Then, if you make your definition that there shall be an intention to kill, you must go on further and say, that there shall be an intention to kill the person killed or any other person, it must be one of the two things.

1746. In those two respects then you think that the present law is right?—I think so. I have some doubt, considering that the punishment of death is now taken away from an intention to kill, not followed by the accomplishment of the intention, whether such a case as the following should remain murder, namely a man shooting at A. and intending to kill A., but missing him, and so not accomplishing what he intended to do, but killing B. and doing that which he did not intend to do. As the law does not now punish the intention to kill unless it is accomplished, I think that that case is almost within the same reasoning, that as he did not intend to do what he did do, but what he did do was a mere accident, it should not be murder; that is to say, not of the first degree, there was an intention to take human life, but he did not take the human life which he intended to take.

1747. (*Mr. Justice O'Hagan.*) His act was followed by the taking away of human life?—Yes; but it might be by the merest accident, and it might be the life of his dearest friend.

1748. (*Chairman.*) And that you would not put in the first class?—I have considerable doubt about it, seeing that the punishment of death is taken away from the mere intention to kill; there was there nothing more than the mere intention to kill, what followed was an accident.

1749. Will you go on to the next point?—Then the killing of officers of justice and other persons authorized to apprehend or detain offenders, I think must remain as it is although there may be no intention to kill.

1750. (*Mr. Bright.*) Do you mean that it is an accidental killing?—Supposing that a person inflicts a wound upon an officer of justice acting as such, or inflicts any injury upon him which terminates fatally, then I think it should be murder although there is not the intention to kill.

1751. Supposing that a man was pressing another at the top of the stairs and he pushed him from him and he pushed him down stairs, and he came at the bottom against some obstruction and was killed, you would call that murder?—If that person was an officer of justice going to enforce the law, I think that it should still be murder.

1752. (*Mr. Hunt.*) The man having no intention to kill?—Having, perhaps, no intention to kill, but being in resistance of an officer of the law.

1753. (*Mr. Ewart.*) That is the present law?—That is the present law.

1754. (*Chairman.*) And that you would retain as it is?—I think so.

1755. (*Mr. Waddington.*) You would retain it in the first class?—I think that I should retain it in the first class because I see immense danger of death, if a person is to be allowed to kill even unintentionally, an officer of justice without being subject to the penalty of death; it would be dangerous to a great many of the officers in the kingdom.

1756. (*Chairman.*) What is your next point?—I think that another class of killing would be the killing of any person resisting the commission of, or interfering to prevent the commission of any felony involving force or violence to person or property. By that I mean a felony involving violence to property, such as burglary.

1757. (*Mr. Waddington.*) Why should it be confined to the person who resisted? Why should it not be extended to killing any person?—I do not recollect why I struck that out, but I have done so. "Killing any person in the course of the commission of a felony" would involve a case which I should exclude.

1758. "In the course of the commission of a certain felony." Would you not alter that and state, "killing any person in the course "of a felony attended with violence to the person?"—No; because, on the spur of the moment, I can imagine a man who is committing a burglary firing at an inmate of the house and the ball going through the window and killing some one outside who he has no idea is there.

1759. (*Mr. Hunt.*) Supposing that a man breaks into a house and finds some one in the first room that he gets into, and shoots him or her, that person not resisting but sitting working: ought not that, in your view, to be murder in the first degree?—Do you mean shooting by accident?

1760. No, intentionally?—Then it would come into my first class—killing with intention to kill.

1761. Without deliberation?—I do not understand how that can be.

1762. (*Mr. Justice O'Hagan.*) Suppose, for instance, that a man goes in to commit a burglary and he is met by a person who resists him, and he strikes that person, not intending to kill him, but simply to put him down?—That person would be a person interfering to prevent the commission of the burglary.

1763. Suppose the case which we have had mentioned to-day, namely, that a man follows another man out of a public house, and, intending to pick his pocket, strikes him across the head with a bar of iron, not intending to kill him at all, but he is killed, would you call that murder?—Certainly.

1764. There would be no intention to kill there at all, and there would be no resistance.—No. I cannot adopt the words, "in the "course of the commission of any felony," because that would include the case which I have just put, of shooting somebody who had nothing whatever to do with the transaction.

1765. Would your definition include the case of a person hearing some one getting into his house, and calling out, and the man firing in the direction where he heard the noise and killing that person?—Yes.

1766. That would be interfering, in your sense?—This is only a crude idea of a definition, but I undoubtedly mean to include such cases as that.

1767. (*Chairman.*) What other cases would you include in the first class?—I think that that would exhaust it as far as I have been able to give my attention to the subject.

1768. (*Mr. Hunt.*) And all cases not in the first class would, I suppose, be in the second?—Yes. Some I would not retain as murder at all.

1769. (*Chairman.*) What would those be?—The case which I gave you, for instance, of a mere aiding and abetting a suicide.

1770. (*Mr. Hunt.*) Take the case of shooting a fowl with intent to

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steal a fowl, and killing a man, you would strike out that case altogether ?—I would make it simply manslaughter.

1771. (*Mr. Ewart.*) You would, I suppose, leave the point of premeditation as a question for the jury ?—Yes. It must always be so.

1772. (*Mr. Bright.*) Has it not been ruled by a Judge that it is premeditation if a man has time to open a knife ?—The slightest act of premeditation would do—half the time to open a knife. A man may open a knife in an instant. According to the English law every homicide is presumed to be murder until the contrary appears, and it lies upon the defendant to show that it is not murder.

1773. (*Mr. Waddington.*) What do you say to the case of administering poison to procure abortion, and its being followed by death, in which class would you put that case; you would I suppose, retain it as murder ?—Yes; because it is in the commission of a felony involving violence to the person, simply because the woman cannot consent.

1774. Suppose that she does consent ?—The law will not allow her, she is guilty of a felony herself.

1775. But I am speaking of the fact. You do not mean to dispute that it is murder by the law at present to kill a woman by administering poison to procure abortion ?—Certainly not.

1776. Would you retain that in the first class, or put it in the second ?—I would put it in the first class. I was anxious to frame my definition so as to say that the killing in the course of the commission of a felony against the person, or of a violent felony against property, should still be murder.

1777. The definition is "against the person." You do not state with violence ?—I used the words "involving violence either to person or "property."

1778. Then that will not include it ?—No; I am quite prepared to find that the slight attempt which I have made to frame a definition, can be picked to pieces directly.

1779. (*Mr. Bright.*) Can you tell us what cases which are now murder you would put in the second class ?—It is very difficult to do that, it involves perhaps the perusal of a dozen pages of a book upon criminal law, where a multitude of instances and varieties of causes of death are given, and the subtle distinctions which have been drawn between some of them as to the particular amount of provocation, and whether there has been a blow sufficiently hard to justify the use of the weapon employed. You will find it laid down in many cases that the injury inflicted must be commensurate with the provocation given, and there are a great many refinements upon those points. Supposing that there has been a fight, and that the parties leave off fighting, and that then one attacks the other again, the law says that if he has had time for his passion to cool, the subsequent killing shall be murder; but where there has been a tussle and an encounter and not such an interval as would leave it beyond all doubt that the quarrel had been forgotten, and that what had taken place afterwards had been a new one, I do not think that it should be murder, and punishable with death.

1780. However much you define, must not something be left to the decision of the jury, and must not that decision depend, like all decisions upon the constitution and temper of the jury at the time, and the surrounding circumstances. Whatever you may write in your laws one jury may put a certain case in the first class, and another jury in another part of the country may put such a case in the second class. Do you think that it is possible by any degree of bill drawing or clause drawing to prevent that ?—After a time you would get a judicial

meaning placed upon your definition, which would be popularly understood.

1781. Is it not now the fact, when you have had judicial decisions for hundreds of years, that sometimes in a case of homicide the greater crime will come in for the smaller punishment, differing from the circumstance of juries recommending to mercy or not, and the difference of the feeling of Judges ?—That is so.

1782. And is not that unavoidable in connexion with this punishment ?—Yes.

1783. (*Chairman.*) Is it not unavoidable in every punishment and every class of offence ?—I think so. There is just the same difficulty in apportioning the punishment for stealing a pocket handkerchief. If a man is tried before one person he will get a month's imprisonment, and if he is tried before another person he will get twelve months.

1784. (*Mr. Bright.*) But the law decides in those cases what shall be the maximum punishment ?—Yes ; but it grants a large discretion.

1785. (*Mr. Waddington.*) With reference to the charges of wounding with intent to murder, or wounding with intent to do grievous bodily harm, do not the juries continually exercise a very wide discretion in those cases ?—Yes. One jury will find guilty of felony, and another jury will find guilty of unlawful wounding only, without a third person being able to discover the slightest difference between the two cases.

1786. That is absolutely inseparable from the nature of the charge ?—Yes.

1787. (*Chairman.*) There is one class of cases to which you have turned your attention, and which you have heard tried very often, namely, cases of infanticide ?—I have.

1788. (*Mr. Hardy.*) Will you say what you include in infanticide? —I understand by infanticide, killing a new-born child.

1789. (*Mr. Hunt.*) Upon the day on which it is born ?—I think that it is perfectly impossible to draw a line as to a new-born child. You must understand in the popular sense the word "new-born." If the child has lived for a month I should not call it a new-born child.

1790. (*Mr. Justice O'Hagan.*) Or a week ?—Or a week. I should not then call it a new-born child. I should not call the killing of a child after it has received any of the ordinary attentions which are bestowed upon children, such as being put to bed with its mother, and being taken care of, the killing of a new-born child.

1791. (*Mr. Waddington.*) I think that the public interpretation of the word "infanticide" is very much larger ; those cases of infanticide go on to cases of children six months old ?—Yes, and as long as they remain children. I suppose infants.

1792. (*Mr. Bright.*) In your experience you have seen a great alteration in the application of the law to cases of infanticide, have you not ?—Yes ; I have seen a growing tendency to acquit people charged with infanticide.

1793. Sir George Grey, I think, has told us, that the last case of a person being executed for killing a child was in the year 1849 ?—Yes; I heard him say so.

1794. You have been in connexion with the law much longer than that ?—Yes.

1795. Do you say that there is a growing indisposition to convict of murder in those cases ?—Yes.

1796. And that if a conviction does take place no execution takes place ?—Quite so.

1797. What is the reason of that ? —When I say that there is an in-

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disposition to convict I ought to qualify that to this extent, that the difficulty of proving the separate existence of the child is brought more prominently forward.

1798. Excluding those cases in which the death is supposed to take place at the hour of birth, still there is a greater indisposition to convict, is there not?—No; I do not think that that is so. I have never discovered any indisposition in the jury to convict in a case where the child has been seen alive separated from the mother.

1799. Have you not found a great indisposition to carry the execution into effect?—It has not been carried into effect.

1800. Do you think now with your knowledge of juries that if Sir George Grey were to issue a proclamation that every person so convicted of murdering any child which could be proved to have been washed and dressed should be executed, you would get as many convictions for murder as you do now in those cases?—My own impression is that the jury would convict if the case was satisfactorily proved.

1801. Is it not notorious and admitted that one of the reasons why the punishment has not been inflicted during the last 15 years, but has invariably been remitted, is because juries did cease to convict, and that that has driven the Home Office into a new course?—If they had ceased to convict the Home Office would not have had to deal with the question at all. They have convicted, and then the Home Office has had to consider what should be done.

1802. Do you not know that in cases of forgery and other offences, the fact of juries having returned verdicts at variance with the evidence because they would not send prisoners to execution, forced a modification of the law. It is not necessary that they should refuse to convict in all cases, but if they refuse in some or many the Home Office is obliged to take cognizance of it and to modify the law; has not that been the case with regard to infanticide?—I do not really think that it has, nor with regard to cases of murder at all. My experience has been that whenever the case has been satisfactorily proved the jury have found a proper verdict. There must have been an exception occasionally.

1803. Then upon what principle is it that nobody has been executed since 1849 for child murder, although in at least one, if not two cases, the victim of the crime was six years old?—I am utterly at a loss to answer that question. I am without the means of answering it, I cannot tell the reason.

1804. It is not from an alteration of the law?—Certainly not.

1805. Do you suppose it to be from an alteration of public opinion?—I think it is very probable that that may have conduced to it. I am aware that there is a vague idea prevailing amongst the public that to murder a new-born child is not so great an offence as to murder a grown up person, but I am utterly at a loss to understand why that should be; it seems to me that the first hour of life is as valuable as the last.

1806. But if the punishment which is awarded is greater in the one case than in the other, is it not a natural thing that the ignorant portion of the public should so conclude?—Yes; it probably is so. At the same time when a woman is convicted of child murder she is very seldom punished with a year or two years' imprisonment, the usual punishment is penal servitude for life. I do not know of any instance of a woman being convicted of child murder, and then being reprieved upon the condition of such a punishment as a year's imprisonment.

1807. (*Mr. Hunt.*) As regards infanticide have you known cases of the jury being reluctant to convict for concealment of birth only, and almost being forced into it by the presiding Judge; the jury wanting to

find a verdict of wilful murder, and the Judge telling them that they cannot?—I cannot say that at this moment I recollect any particular instance, but that verdicts are found by coroners' juries over and over again in such cases without any evidence to justify them is pretty clear.

1808. (*Chairman.*) With regard to the crime of infanticide would you suggest any alteration in the present law?—No; if a clear case be proved, I would leave the existing law of murder to deal with it; but inasmuch as you cannot get over the enormous difficulty which there is in proving that the injury was inflicted upon the child after its separation from the mother, it has occurred to me for some considerable time past that there ought to be a new felony created, by which it should be enacted, that every person who committed violence or injury upon the body of a child before, during, or after its birth, and before the birth was disclosed to some other person, should be guilty of felony. I have one or two cases here—I have brought the depositions with me—one was a case which was tried at the Central Criminal Court in November last. The girl was a girl of 16, she was in service, her mistress had a few friends who came to see her on a Sunday evening, the girl was about her duties in the ordinary way, she took up something into the sitting room at half-past seven, and she had nothing more to do till half-past ten, that is to say to bring her into contact with her mistress. During that time she was delivered of a child, she cut its throat, she tied it up in a bundle, took it out and put it in the street, and she came back and went about her work as usual, and nobody in the house knew anything at all of what had happened. The evidence of the injury to the child was this, the surgeon found a wound of three inches upon the throat, he found a notch in that wound which showed him that the cutting had stopped and had then gone on again, and the body of the child was drained of blood. The girl denied that she had had a child, she denied that she knew anything at all about it, but ultimately she made a statement in which she admitted to the policeman that she had had a child, and she accounted for the injury to the child by saying that she felt a pain coming on and placed her hand upon the kitchen mantel-piece and her foot on the fender, and that the child was born in that position and fell upon the fender and received the injuries which appeared upon it. The result was that she was convicted of endeavouring to conceal the birth, there not being sufficient evidence to show that the throat was cut after the child was separated from the mother. The medical man said in his cross-examination, that which nine-tenths of them may be made to say. He was cross-examined by Mr. Sleigh, and he was asked "Is it a fact that a child may breathe before it has passed "into the world? Yes; there is a great difference of opinion about "whether the hydrostatic test can safely be relied upon. With regard "to the fracture of the skull it has been the case that the cranium has "been pressed against the pelvis in the pains of labour, and has been "fractured. I knew a case where the throat was cut when the child "was half-born, in the endeavour to cut the umbilical cord; it was not "a case of mine but my father's—the woman was alone. I know, as a "man of experience, that in the case of a poor wretched woman cutting "the navel-string, wounds are frequently inflicted unintentionally on "the child itself." Upon that sort of evidence the juries are too glad to come to the conclusion that they are justified in supposing that the death was inflicted before the child was separated from the mother.

1809. (*Mr. Waddington.*) It would not have been a rash conclusion upon that evidence to have found her guilty of wilful murder?—I should undoubtedly have found her guilty. Of course I am not giving you the whole of the facts; there are a great many others.

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1810. (*Mr. Hardy.*) What was the sentence in that case; was it two years' imprisonment?—The jury found her guilty of endeavouring to conceal the birth; she was recommended to mercy by the jury on account of her youth. She was only 16; she was sentenced to 12 months' imprisonment.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Wednesday, 15th February 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
MR. JUSTICE O'HAGAN.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

H. Avory, Esq.

HENRY AVORY, ESQ., further examined.

1811. (*Chairman.*) Will you state what new enactment you would propose in the case of infanticide?—I will endeavour to do so, prefacing it with just a few observations which occur to me. In the first place, the law punishes with penal servitude for life any attempt to destroy a fœtus. It will not execute a woman who has quickened, because it will not take the life of her child. The law therefore looks upon the first hour of life as being as valuable as the last. The destruction of a child before birth, or in the act of birth, or in the first hour of its life, may be the result of a most deliberate and wicked conspiracy to destroy it. It seems to me, therefore, to be impossible to take such a case out of the category of murder. The law not permitting the destruction of the child, or any attempt to destroy it before its birth, I think that there ought to be some provision to prevent the mutilation even of the dead body, because that more often takes place from a desire to conceal the birth and to facilitate the disposal of the body than otherwise, and I would, therefore, propose an enactment in substance that whosoever, under any circumstances, not amounting to murder or manslaughter, shall unlawfully inflict any injury or violence upon any child, or the dead body of any child, before or during its birth, or after its birth, and before the disclosure of its birth to some person other than an offender, shall be guilty of felony. One case, which is strong in my memory at this moment, is the case of Mary Ann Adams, tried at Kingston, before Mr. Baron Martin, and it was most distinctly proved that she had been delivered of a child, in fact, she confessed it afterwards. She had cut that child into upwards of 30 pieces, and disposed of those pieces in various parts of the premises. The whole of the body was ultimately found, with the exception of the organs which might have shown whether life had existed or not; they were not discovered. There was, of course, no proof that the child had been born alive. She was convicted

of nothing but an endeavour to conceal the birth, and Mr. Baron Martin gave her the utmost limit of imprisonment which he ever gives to anybody, namely 18 months. There are cases continually occurring where the child is mutilated in that way, and one can hardly conceive that such a thing as that can take place when the mother is in any other state except the full possession of her faculties.

1812. (*Lord Stanley.*) Would not your purpose be served by giving to the Judge a larger discretion as to the punishment to be inflicted for concealment of birth?—No; because in many of these cases there is no attempt to conceal. The woman is discovered before she has had time to get rid of the body; some one comes in, and perhaps finds the body in a half mutilated condition, and she has not secretly disposed of the dead body before it is discovered.

1813. If the dead body of the child were found cut up, would not it be considered that that was evidence of her intention to make away with it, and to conceal the birth?—But the present law requires that there should be a secret disposition of the dead body.

1814. (*Mr. Neate.*) There is no penalty now for concealment of pregnancy, is there?—No.

1815. Not up to the very last?—No; as to these cases of concealment of birth, I have not the statistics previously to 1834, but I have them from that year. In 1834 the number of cases of concealment of birth in the whole kingdom was 44; in 1835 it was 37.

1816. (*Mr. Waddington.*) Are you speaking of cases of convictions?—No; the total number of persons committed for trial for concealment of birth. In 1836 it was 45. Then I have them in periods of five years. From 1837 to 1841 there were 246 cases, the average of which would be much about the same. From 1842 to 1846 the number was 333. From 1847 to 1851 the number was exactly the same. From 1852 to 1856 it was 461. From 1857 to 1861 it was 522, and it has been increasing each year since.

1817. The coroners' verdicts for infanticide have also regularly increased?—They have; it appears that the new-born children are not distinguished in the returns, so that you cannot ascertain how many inquests were held upon new-born children, but the number of children under seven years of age upon whom inquests were held appears to be about 5,000 in the course of the year.

1818. (*Mr. Bright.*) Is it not the fact that, of late, the practice of holding inquests in all cases has been more common than it was?—That practice has been checked. It was said to be a general practice to hold unnecessary inquests, but the matter came before the magistrates of several counties, and in consequence of that I think that there has been no complaint since of holding unnecessary inquests.

1819. (*Mr. Waddington.*) The coroners are now paid by salary, instead of by fees as formerly?—That is so.

1820. (*Mr. Bright.*) With the extension of the police force more universally throughout the country, is it not your opinion that an increasing number of these cases come to the ears of somebody and eventually to the police, and that thus inquests are held, and the cases get into your statistics much more than they did a few years ago?—I think that, undoubtedly, the increased efficiency of the police brings to light more offences than would have been discovered but for their efficiency. I do not at all mean to say that there were not as large a number of offences committed before as are committed now.

1821. If the chances of conviction for the capital offence have diminished, there would be less indisposition on the part of any persons

H. Avory, Esq. knowing of cases of this kind, to bring them before the public, than there would otherwise be?—Yes.

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1822. And these two circumstances, the extension and increased efficiency of the police, and the diminution of the punishment, are calculated to bring to light many more of these cases than would have been brought to light in previous years?—Yes, I think that that is so. There is undoubtedly a very strong feeling against the punishment of death being inflicted upon women who have killed new-born children.

1823. Is it not an insurmountable feeling?—I do not say that it is universal, because I do not entertain it myself. As far as I am concerned I should punish everyone of them. I cannot understand why a child is to be destroyed.

1824. (*Mr. Hunt.*) In the case of a woman being indicted for the murder of her child, would you allow the jury to find the offence for which you have proposed a new enactment?—You mean in the same manner as they can at present find the concealment of birth. I am rather doubtful about that, because when two alternatives are offered to the jury they always choose the milder one, at least there is a strong disposition with them to do it.

1825. Supposing that you had what you have proposed as a substantive offence, would you allow the jury on an indictment for it to find concealment?—I think I would rather keep them separate. I like one issue to be offered to the jury, and one only.

1826. Supposing that your view was carried into law and that a substantive offence of this nature was created, I suppose the practical effect would be that no woman would be put upon her trial for murder in case of violence done to a new-born child resulting in death, but that she would be put upon her trial for this offence?—I think that that probably would be the result unless in a very clear case. I can conceive such a case as evidence existing of an agreement made before the birth to destroy the child in its birth or immediately afterwards, and evidence existing of the fact of the child having been a separately existing person and having then been killed.

1827. (*Chairman.*) Would not that come under an indictment for murder?—Yes; if there was a clear case of that sort then the person would be indicted for murder, but in all cases which were left in doubt as to whether the child had attained its separate existence an indictment for the offence which I have proposed would meet the circumstances, which would not be met by the present law against the concealment of birth.

1828. (*Mr. Waddington.*) You do not confine it to cases where the child dies after the violence?—No; because then it might be murder, or it might be manslaughter.

1829. (*Mr. Hunt.*) Your wording is "whosoever under any cir- "cumstances, not amounting to murder or manslaughter, shall" do so. But this offence would be a more serious offence than manslaughter, would it not?—No; manslaughter is punishable with penal servitude for life or less according to its aspect; and it is felony.

1830. I am not speaking of the punishment, but I am speaking of the offence. Your words are "Whosoever under any circumstances "not amounting to murder or manslaughter, shall unlawfully inflict "any injury or violence upon any child, or the dead body of any child, "before or during its birth, or after its birth, and before the dis- "closure of its birth to some person other than an offender, shall be "guilty of felony." Would not that be a more serious offence than the lighter kind of manslaughter?—It would be a more serious offence

probably than the lighter kinds of manslaughter; but "manslaughter" is a generic term, and includes a vast range. I put that in because supposing you leave it out it may then be said to be a virtual repeal of the law of murder in such cases.

1831. (*Mr. Waddington.*) Should there not be some intent stated, because as you have worded it if the child does not die it is nothing but an accident. Should there not be some intent in order to distinguish it from a common accident?—The way in which I reasoned with myself was this: it is made a misdemeanor accompanied with two years' imprisonment for a woman decently to bury her child in her garden, supposing it to be born dead.

1832. That is with a particular intent?—Yes; the object being to conceal the birth.

1833. But you have left it quite at large?—I have.

1834. This would apply to a person, who had no wish to conceal the birth at all, assaulting the child. Should there not be some intent added to the words, in order to justify the making it a felony?—That is subject to further consideration. I do not mean to say that I have spent sufficient time over the construction of that clause to make it perfect.

1835. (*Mr. Hunt.*) Whether the child died or not, you would consider the offence completed?—Yes.

1836. With regard to the clause which you suggest, what do you think should be the punishment for this offence?—I would give a large discretion to the Judge. I would give him power to inflict penal servitude.

1837. For how long?—I have hardly thought upon the extreme cases which might be included.

1838. In the case of a woman cutting up her child into pieces in order to conceal the offence, should you see any objection to her being liable to penal servitude for life?—I do not think that it would be inflicted, even if there was the strongest suspicion that the child had been born alive. Ten years, I should think, would be sufficient.

1839. You would give a long period of penal servitude?—Yes, certainly.

1840. (*Mr. Hardy.*) Do not you think that it would be very advisable to classify cases of manslaughter also?—I think that it would be very desirable, and that some offences which are now manslaughter, and therefore felony, should cease to be felony, and that there should be a power given to the Judge to inflict a pecuniary fine only in some of the cases of manslaughter and to absolve the accused from forfeiture.

1841. (*Mr. Waddington.*) Cannot he inflict a pecuniary fine now?—He has no power to inflict a fine for a felony except by statute.

1842. He may inflict a day's imprisonment?—He may do so, but then that is followed by forfeiture of everything which the prisoner possesses.

1843. (*Mr. Hardy.*) In fact, in a great many cases of manslaughter the word "felony" is wholly inappropriate.—Perfectly so.

1844. (*Chairman.*) What is the next point which you have to mention?—I do not know whether the Commission wish to ask me any questions as to the punishment of death itself. Upon the threshold of that subject, I should state my opinion of the extreme desirability of the Judge having power to record the sentence instead of pronouncing it.

1845. (*Lord Stanley.*) You mean that there is an objection to a sentence being pronounced when many persons in Court know that

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it will not be executed?—Yes; and when the Judge himself does not intend that it shall be executed, as far as in him lies.

1846. It reduces what ought to be a very solemn ceremony to a form?—Yes, and it is very objectionable.

1847. (*Mr. Hardy.*) Would you give the Judge the power in all cases to pronounce the sentence of death in what form he thought proper, or would you have the old form of saying, "I record the sentence of death?"—I think that it is most desirable that he should have the power to record the sentence of death.

1848. (*Mr. Waddington.*) You think it desirable to restore the law to the state in which it was before the Act of 1861?—Yes.

1849. (*Mr. Hunt.*) In the event of the classification of murders being adopted, would you allow the Judge to record the sentence of death in the case of murders in the first degree?—I think that I would, because in the course of my experience I have seen cases, which at first sight appeared to be bad murders, resolve themselves into the very mildest form of murder, on account of circumstances being disclosed which nobody had a knowledge of before.

1850. (*Mr. Waddington.*) There might also be instances in the worst cases of murder where the Judge was not satisfied with the verdict.—Yes.

1851. (*Chairman.*) With regard to the Judge having power to record sentence of death, there has been a question put to several witnesses with reference to giving the jury power to find extenuating circumstances. What is your opinion upon that point?—I do not think that that would be desirable, but I form that opinion chiefly from what I see goes on in France, where extenuating circumstances are found as a sort of compromise.

1852. (*Mr. Hardy.*) Does not the case of unlawful wounding lead you to very much the same conclusion in England?—It does.

1853. (*Lord Stanley.*) Assuming that that is so, and that a verdict of extenuating circumstances is found by way of compromise, would not that often operate to prevent what would otherwise happen, namely, an unjust acquittal? Are there not many cases in which, as the law now stands, the jury would acquit, contrary to the evidence, where, if they could find the prisoner guilty with extenuating circumstances, they would adopt the latter course?—There may be such cases, but I can safely say that in the whole course of my experience I have never found a jury acquit, in a case of murder, without there being something which might be called a reasonable ground for the acquittal.

1854. (*Mr. Hardy.*) When they have one issue distinctly put before them, they will find the truth upon it as far as they can.—I think so.

1855. (*Lord Stanley.*) Have you never known a verdict of manslaughter found in a case which was either murder or nothing?—My experience of course does not extend to the whole country, but I have heard of such cases.

1856. (*Mr. Hunt.*) Supposing that there was a classification of murders, do you think that it ought to be left to the jury, when a man was indicted for murder, to say in which class the murder fell, or should there merely left to the jury the question, Murder or no murder? and should it be left to the Judge to say in which class it ought to fall?—I think that it should be left, as it is now, to the Judge to declare what the offence and the degree of the offence is.

1857. At present there is only the offence of murder, but supposing that the law was to be altered, and that murder was of the first and of the second degree, would you allow the jury to say that the murder was

in the second degree, or would you require them merely to say, murder or not murder; and allow the Judge to say whether it was in the first or the second degree ?—I think that then I should be disposed to give the jury the option.

1858. (*Mr. Waddington.*) Could it be otherwise. If the question turned upon whether the murder was premeditated or not, the jury would have to find the fact of premeditation, and the Judge would then direct them as to the law ?—Yes, but I conceive that even then the Judge would have to direct them as he does now, whether it was murder or manslaughter.

1859. (*Chairman.*) But it would be left to the jury under the direction of the Judge ?—Yes.

1860. (*Mr. Hunt.*) Supposing that it were left to the jury, do you think that they would be under the same temptation as they are now, in the case of indictments for felonious wounding with the option of finding unlawful wounding, of always finding murder in the second degree, or do you think that you could trust them to find murder in the first degree if the evidence warranted it ?—I think that juries may be trusted to do so ; I have never found a jury hesitate to find murder where a clear case of murder has been proved.

1861. But then they only have one issue before them ?—They may always find manslaughter upon an indictment for murder.

1862. Is it not very rare that the circumstances allow of the Judge saying that they may find manslaughter ?—No ; a case occurred quite recently.

1863. Is it not generally a case of murder or of not guilty ?—No ; I should say certainly not ; there are many cases where the verdict is not guilty of murder but guilty of manslaughter.

1864. (*Mr. Waddington.*) Upon this question of how far juries can be trusted, with your great experience have you found that juries are in the habit of returning verdicts of manslaughter in cases which are really cases of murder ?—I have not. An instance of that occurred, I think, the session before last at the Old Bailey, in the case of an alleged murder in Clerkenwell, where a man was charged with deliberately murdering his fellow-workman. It was left by Mr. Baron Pigott to the jury to say whether there had been a quarrel between them, or anything, in their opinion, reducing the offence to manslaughter. They found a verdict of manslaughter, and he gave the prisoner penal servitude for life, the whole thing being left in perfect obscurity as to what had taken place immediately before the man was killed.

1865. (*Mr. Hunt.*) In answer to a question by Mr. Hardy, you stated that, with regard to indictments for felonious wounding the jury almost always found the minor offence ?—I should have qualified it by saying, unless the Judge is very strong in his direction. There is a leaning even on the part of the Judges to let the minor verdict be found.

1866. Would there not be a greater temptation to do so in the case of an offence where the man's life would be forfeited if the greater offence were found ?—I cannot say that the temptation would be greater, for I have sufficient confidence in the honesty of juries to say that I think they would do their duty. There might be exceptions, as there would be in every phase of human affairs. I might add here that my own impression is that it would be very desirable, if murder is to be classified, that there should be a crime distinctly separated from everything else, known as murder without degrees, and that everything which did not come within what you would call murder should

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be reduced at once, not to murder in the second degree, but to manslaughter.

1867. (*Lord Stanley.*) That is a question of names; because, for manslaughter you can give penal servitude for life?—Quite so.

1868. And there probably would be no severer punishment short of death for murder in the second degree?—Quite so.

1869. (*Chairman.*) You think that it would have a bad effect upon the population if they thought that they might commit some sort of murder without being hanged for it?—Yes; it is very desirable to convey to the popular and public mind that if a murder is committed it must be followed by certain consequences.

1870. What is your next point?—It occurred to me that as the Commission seem to have been inquiring as to the restraining effect of the punishment of death, those matters which appear upon the statistics might be alluded to; I would first assume that if a murder has been committed in the course of the commission of another crime, or to enable the offender to commit another crime, he would have been executed, and we should find him amongst the number executed. I find that in 1856, out of 14 persons executed only four of the offences had relation to any other crime at all; that is to say that those four were committed either for the purposes of plunder, or to enable a robber to escape, or something of that sort. All the rest of them were from motives of revenge or jealousy, or matters of that kind. In 1857, out of 14, there were three of such cases; in 1858, out of 11, there were four; in 1859, out of nine, there were three; in 1860, out of 12 cases, there were four; in 1861, out of 15 cases, there were five; in 1862, out of 16 cases there were four. I infer from these facts that there must be something which restrains the criminal classes from the commission of murder, and I do not know what else it can be than the fear of the punishment of death. With the vast criminal class which we have in this country, an average, say of four, commit murder in the course of a year.

1871. (*Mr. Waddington.*) You mean in the course of committing some other offence?—Yes; that is to say, that in the course of the commission of their crimes, many of which would be facilitated by murder, and in many of which they would escape the consequences by murder, they are restrained from the commission of murder by something.

1872. (*Mr. Bright.*) The criminal class is merely a profession not recognized by law is it not. What you call the criminal class are a class of persons who live by modes of proceeding not approved by law?—Yes; and I would say punished by law.

1873. Their object is to live?—Yes.

1874. And for that they rob, they commit larcenies, and highway robberies, and burglaries, and so forth?—Yes.

1875. And in cases where murder was not absolutely necessary for the pursuit of their profession they could have no inducement to commit murder?—Certainly not.

1876. Is it not a notorious fact, that if there be a murder committed there is ten times more hue and cry, and endeavour to secure the offender, than in the case of an ordinary robbery, even a burglary?—Yes; I think that that is so.

1877. And, therefore, a man committing a burglary, or any sort of robbery, has an inducement not to commit murder if he can possibly avoid it. He had better commit a robbery where there can be no temptation to murder than a robbery with a great temptation to murder, and in which murder might follow, because in the latter case, he would be very much more likely to be pursued and secured and punished in

some way ?—Yes ; it includes the punishment, as well as the danger of detection.

1878. Your answer would lead to the supposition that the reason why murders are not committed along with robberies is because the punishment of death is attached to murder ?—Yes.

1879. I do not say that that has no effect, but I ask you whether the other reasons which I have stated to you may not fairly be supposed also to have a great effect ?—I really do not think so. The object of a man's committing a murder would be to destroy the evidence or to prevent his apprehension.

1880. It is not clear that in all cases, and perhaps not in the majority of cases, he would destroy the evidence ; he might in some cases, but not in all ?—He would destroy that which he considers to be the evidence.

1881. He would destroy a portion of the evidence ?—That which he considers to affect him most.

1882. You recollect a very unhappy case of an old clergyman at Frimley ?—Yes ; very well.

1883. In that case it was not supposed that the burglars intended murder when they went to the house, they killed that gentleman because he resisted ?—Yes.

1884. Having killed him, do you not suppose the efforts made in that part of the county to arrest the murderers were greatly increased, with a much greater probability of success, because a murder had been committed, than if there had only been a burglary ?—Undoubtedly.

1885. Therefore, although there may be cases in which there would be a temptation to a kill a person who resisted, as in that case ; still, may not the increased effort to discover the perpetrators of the crime be set against your theory that they do not murder because Capital Punishment is attached to murder ?—I think not ; because the object of murder is to destroy the evidence which a man thinks can alone affect him, and if he puts that evidence out of the way he does not care what hue and cry there is, he expects that nothing in the world will be able to detect him.

1886. Does not that happen almost entirely in those cases where the burglar or the criminal is known to the person whom he is attacking. In the case which I have mentioned he might have been known or not, but in the case of a man going into a house with his face blackened, in order to commit a burglary, if the owner of the house says, "I know you, you are so and so," and discovers him, would there not then be an extra temptation to murder him ?—Yes ; or if the person in the house say, "I shall follow you."

1887. That must only be a very small proportion of the cases, I presume, to which your view would refer ?—It might be. I do not at all mean to say that all the criminal classes would commit murder for the purpose of concealing their offences, on the contrary, I should think that only a very small proportion would do it, but that small proportion would not hesitate in the least degree to it, do except for the fear of being "choked" as they call it.

1888. Is it not a fact now that a large proportion, and probably more than half of all those persons convicted of murder, have never at any other time been convicted of any other offence against the law ?—Undoubtedly ; but I should add to that, that their murders are such as no punishment which could be invented, or ever was invented, would prevent.

1889. Then in point of fact you hold the punishment of death to be

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useful at present in the almost entire prohibition of murders amongst the criminal class?—Yes.

1890. But it has no sensible effect in preventing murders in the non-criminal class?—I think that where a murder is resolved upon from motives of revenge or jealousy, or anger of any sort or kind, the consequences are not at all taken into account; they are never thought of, and a man not having been accustomed throughout his life to dwell upon the consequences of his act, that is to say, not having been accustomed to commit criminal acts, the question of the result of what he is going to do does not enter into his consideration.

1891. Then I understand that your view in favour of the maintenance of Capital Punishment is directed mainly and almost entirely to the effect which it has upon the criminal class in preventing them from committing murders, and you think that it is very successful in that respect?—I think so certainly.

1892. You argue that, because there do not appear to be many murders from that class?—Yes.

1893. But there is another class of society, a higher class, in which there are very few murders, and you would not consider it quite fair to argue that they are kept down upon the same ground?—I think that there are better motives actuating the higher class of people, those who are educated. The mere unwillingness to do anything which is wrong would restrain a man in an educated condition.

1894. Would not your argument lead to this, that if we could maintain Capital Punishment for the criminal class, as no punishment affects the other class which commits murder, we should have a perfection of the law; that, in point of fact, we should repress murders in the criminal class, we should hang nobody, and there would continue to be still a few murders in the class not criminal?—It is utterly impossible to define what the criminal class is, or who is disposed to enter into it. A man who is to day a very respectable member of society, may be disposed to-morrow to become a member of the criminal class.

1895. If you took 50 policemen from different parts of London, they could perhaps give you the names, or certainly could tell you that they knew some hundreds of men in London, and probably some thousands, who live only by offences against the law?—Yes.

1896. You think that with regard to them Capital Punishment is very effective?—I think so, certainly.

1897. (*Mr. Hardy.*) Am I to understand you to say that you think that it has no effect upon the other class of murderers, who murder from other motives than that of assisting in the commission of crimes?—I really think that the question of the consequences of what they are about to do never enters into the consideration of such people.

1898. Then upon what grounds do you suppose that a great many of them take the immense pains which they do to conceal what they are doing?—The consciousness probably arises immediately upon the act being done. But while a man is in the frenzy of his desire to gratify his object of revenge or passion, I do not think that there is an opportunity for reflecting upon the consequences.

1899. That is at the moment?—Or as soon as the resolve enters into his mind. I would say that he is dead to the consideration of what is to follow until he has accomplished his object, and then he becomes suddenly awakened to it.

1900. Do you suppose that those persons who have those desires are never checked by what will happen to them in this world?—I would not say that as a rule I do, because the first desire of murder may occur

to a man and he may resolve not to do it, simply from the dread of the consequences. *H. Avory, Esq.*

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1901. I assume that all punishments are based upon the supposition that people who are not influenced by moral considerations are influenced by the fear of being punished ?—Yes ; that is the only object of punishing any person, namely to create that feeling in others.

1902. Then the abolition of the punishment of death in such cases as are carried to the extreme of murder must in principle be carried out with other punishments where the motive is not what we call a criminal motive, in the sense of committing some particular crime, but arises from revenge, or love, or causes of that kind ?—I certainly would not abolish the punishment of death. I do not know what restraining effect it has upon that class of murderers, because I have no materials to judge ; but I have those materials from which I can judge of its effect in restraining the other class, and I certainly would not abolish it.

1903. Irrespectively of what you consider the criminal class, is there not an enormous class of persons, not only in this country but in other countries, who are utterly unrestrained by religious or moral considerations ?—Undoubtedly.

1904. And who will commit sins to any extent, so long as they do not bring themselves within the criminal law ?—Yes.

1905. Do you suppose that persons of that class are not influenced in the limitation of their misdeeds by the sense of what may happen to them by the punishment inflicted by law ?—I think they are.

1906. If you stop them in the early progress of vice by the fear of that sort of punishment, do you not think that the highest punishment of all would also deter from the commission of crime in many instances, which never therefore come into the criminal list ?—It must be so.

1907. As I understood, from the questions which were put, the limitation was rather imposed upon you that Capital Punishment was only efficacious upon what are called the criminal classes, to prevent them in the commission of other crimes from resorting to murder ?—I did not mean at all to adopt the limitation in its full extent.

1908. (*Mr. Hunt.*) I understand you to mean that there are a certain number of persons who are so carried away by a mastering passion, that nothing will restrain them ?—Yes.

1909. Whether they belong to the criminal classes or not, there are certain cases of ungovernable passion which nothing will restrain ?—Quite so ; I mean that a man would do what he was going to do, if his death was to follow upon the instant of his doing it.

1910. (*Mr. Ewart.*) In the number of these persons who act as you say upon impulse, do you include those who act upon cupidity and sudden temptation to seize another person's property ?—I should include that case in murder by one of the criminal class, the object being plunder.

1911. Would you call a man who acted upon a sudden impulse, such as I understand you to except in your illustration, a man who belonged to the criminal class if he had never committed the crime before !—If he commits the crime for the purpose of robbery I should say that he belongs to the criminal class, he must have conceived the desire to rob before he committed the murder.

1912. I am not putting the case of a long premeditated crime, but of a sudden impulse which affects a man with the desire to seize another man's goods ; the same sudden impulse as affects another man with revenge ?—I should say that he belongs to the criminal class, although we have not found him out before, he may be a criminal without being known to be a criminal.

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1913. If I understand you rightly you limit the efficacy of the punishment of death to a certain portion of those who commit crimes, whom you denominate the criminal class ?—I did not intend to limit the efficacy of the punishment at all, but I intended to convey that I thought that it was more efficacious in preventing the criminal class from committing murder.

1914. I understood you to say that a man who acted upon the sudden impulse of revenge or jealousy did not take into his consideration the consequences of his crime ?—Yes.

1915. Therefore out of those who commit crime you must omit a considerable number who are not influenced by the fear of the punishment of death ?—Yes ; but I think that if in spite of their being uninfluenced you punish them with death, you create a very great influence upon other people to prevent their getting into that sudden phrenzy, in which they cannot realize what will happen to them.

1916. Therefore would not it follow that for the sake of producing an effect upon a certain portion of those who commit crime, you would retain the punishment of death altogether ?—I would retain the punishment of death, because I think that it has efficacy upon every one in preventing the commission of murder.

1917. You have said that it has no effect upon persons who act from a sudden impulse ?—It is difficult to distinguish between its particular effect upon a man about to commit a murder, and its effect upon all persons in smothering the first disposition to do anything wrong.

1918. (*Mr. Waddington.*) Does your experience carry you back to the time when persons were hanged for highway robberies and burglaries, unaccompanied by murder ?—No.

1919. You cannot tell us whether murders were then more frequently committed in the course of the commission of those crimes ?—No.

1920. You have seen many sentences of death passed ?—Yes.

1921. What is the effect of the sentence upon the prisoners themselves ?—They become perfectly prostrate under it. The whole scene is of the most solemn character imaginable. I have seen full-grown men, mere spectators in court, shed tears ; the whole thing is of that solemn character that nobody can sit there and be unaffected by it. Now and then you may have a man like the man at Dorchester who was tried in irons, and who was more like a wild beast than a human being.

1922. You mean the man who murdered a warder ?—Yes.

1923. (*Mr. Bright.*) Did you ever see any of the criminal class shed tears ?—Yes ; many of them, plenty of murderers.

1924. (*Mr. Justice O'Hagan.*) The general effect upon the men sentenced is to depress them ?—Undoubtedly.

1925. (*Mr. Waddington.*) To crush them ?—It crushes them in 999 cases out of a thousand; the man is perfectly crushed and prostrated.

1926. (*Chairman.*) Have you any other point to mention ?—As to public executions, I do not know that I am able to give any particular information.

1927. (*Mr. Hardy.*) Will you state your opinion upon the question of public executions ?—It is not formed from any personal experience, and it is a mere theoretical view which I have. I never saw an execution, but I have seen the mob immediately afterwards. Having to go to the Old Bailey before 10 o'clock I have got there before the mob has cleared away, and certainly it is a collection of the worst ruffians that one can conceive, and I think an execution within the walls of the prison would answer every purpose of efficacy which you desire to have in the execution itself ; but it must of course be carried out

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with safeguards, and such safeguards as will satisfy the public of its due execution. Whether it should be surrounded by any ceremonials is a matter upon which I have really hardly made up my mind; I think that as the destruction of a life is one of the most solemn acts in which the state can be engaged, it should be surrounded with as much solemnity as is possible without theatrical display. I think that all persons who are witnesses upon the trial should be at liberty to attend the execution if they think fit, but not compelled to attend, it being very desirable in my opinion that those who are acquainted with the person of the convict should be able to say that they have seen him executed. A coroner's inquest on a view of the body summoned to inquire whether A. B. who was condemned to death has been executed according to law, should deliver their verdict, and then that the names of all persons who are present at the execution should be added to the inquisition, and published in the Gazette and newspapers.

1928. (*Mr Bright.*) And that it should be paid for as an advertisement?—I do not know as to that, but I suppose that it would be so, by the State.

1929. In the same way as the game certificates are paid for?—Or the announcement of any other public event.

The witness withdrew.

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Leone Levi, Esq., examined.

1930. (*Chairman.*) You are a Professor at King's College?—I am Professor of Commercial Law at King's College.

1931. How long have you been so?—Since 1852, 13 years; I am also a Barrister-at-Law and Doctor of Economic Science.

1932. You have turned your attention to the subject of Capital Punishment?—I have.

1933. For some considerable time?—Yes.

1934. You have come to the conclusion that it is not desirable to inflict Capital Punishment for any crime?—I have the conviction very strongly that it is unadvisable to retain the punishment of death.

1935. Having told us that that is the conclusion to which you have come, will you be kind enough to give us your reasons for that conviction?—The first reason which appears to me is, that it is inefficient for the purposes of justice, and I will prove it by showing a few statistical facts. I find from the Judicial Statistics published by the Home Office that, from 1857 to 1863 there were yearly a certain number of verdicts of murder given by the coroners' inquests. In 1857 there were 184; in 1858 there were 183; in 1859 there were 204; in 1860 there were 268; in 1861 there were 210; in 1862 there were 221, and in 1863 there were 270. But it does not appear that anything like the number of murderers in proportion to the number of murders committed were apprehended. The same Judicial Statistics give us the number of murders known to the police as having been committed during the same year, and they were as follows:—In 1857, 99; in 1858, 112; in 1859, 95; in 1860, 99; in 1861, 106; in 1862, 124; and in 1863, 121. Here then we have a great reduction in the number from year to year, and what is probably the reason? because the police cannot trace them.

1936. (*Mr. Waddington.*) Do you know how many of those were cases of infanticide?—That is not given. I merely state the facts as they are given in the Judicial Statistics.

1937. (*Mr. Hardy.*) Will you give me the numbers for 1862 and

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1863 ?—In 1862 there were 221 verdicts of murder, and in 1863 there were 270. In 1862 there were 124 murders known to the police, and in 1863 only 121. Taking 1863, in that year there were 270 verdicts of murder given by the coroners' inquests; and 121 murders were reported as known to the police. In the same year there were 127 persons apprehended by the police for murder, only 103 of whom were committed for trial. I am now quoting from the police reports. Turning to the table of persons committed for trial before the assizes, the Judicial Statistics give the number committed at 83. Probably there is an interval of time between the report of cases which come before the police and the report of cases which come up before the assizes, and so the accounts differ from one page to the other.

1938. (*Mr. Hunt.*) I understand that you reconcile the difference in this way:—That a number of persons are reported as committed for trial by the police who fall under one year, but some of them are not actually tried till the next year ?—That is probable. Passing to the assize returns, we find that 83 were committed for trial; out of this number 29 were convicted, and 22 were executed. So that taking the number of punishments of death in relation to the crimes committed, if we take the verdicts of murder given by the coroners' inquests, we have it that out of 270 murders, for which a verdict of murder had been given, only 22 were actually punished by death. That shows a very small proportion indeed, and as we know that the punishment of death means in most cases punishment of death or nothing, it is evident that a very large number of criminals escape altogether, partly from the pursuit of the police in the first instance, partly from the subsequent unwillingness of the juries to convict, partly from exemptions on the plea of insanity, and partly from the exercise of mercy by the Minister of the Home Department, so that only 22 out of 270 appear to have really been punished in that year. The only years for which we have these accurate reports are from 1857 to 1863, and I have given them year by year.

1939. (*Chairman.*) You stated that 22 persons were executed. You said that it was death or nothing ?—I mean generally speaking, so far as the trial goes. If the jury do not bring in a verdict of murder the prisoner is acquitted altogether.

1940. That would not be so in all cases, would it ?—Not in all cases, but in most cases.

1941. (*Mr. Justice O'Hagan.*) Sometimes there is a verdict of manslaughter ?—Sometimes.

1942. (*Chairman.*) Out of those 83 persons who were committed to take their trial for murder, can you distinguish between infanticide and other sorts of murder ?—I have not been able to do so from these statistics. I have taken them just as they are published.

1943. (*Mr. Hardy.*) In 1863 the verdicts of wilful murder in cases of infanticide were 166; that cuts the whole number down to 104 ?—Yes. Another reason I have against Capital Punishment is, that whilst it is too rigorous for the Judges and juries to convict, as proved by the previous facts, the punishment is too light to the criminals themselves, or to persons about to commit crime, to prove a sufficient deterrent, and I will prove this from the large number of suicides. Persons are led to suppose that death is a very great deterrent. The fact is that there are certain states of mind, certain states of desperation, certain states of morbid aberration, in which death has not that deterrent effect; in some cases it is even desired, and in others it is totally disregarded. I find that whilst these comparatively few persons have been executed by the hands of the law a hundred times as many have

themselves rushed into death. In 1857 there were 13 persons executed, and 1,349 killed themselves.

1944. (*Mr. Bright.*) In this country ?—In this country ; that is to say, in England and Wales. In 1858 there were 1,275 suicides, in 1859 there were 1,240, in 1860 there were 1,357, in 1861 there were 1,324, in 1862 there were 1,284, and in 1863 there were 1,385.

1945. (*Mr. Waddington.*) Where do you get those numbers ?—From the Judicial Statistics. They give the coroners' inquests.

1946. (*Mr. Bright.*) Do those numbers include only the cases in which a verdict of suicide has been returned ?—They are the number of verdicts of suicide by the coroners' inquests.

1947. But cases where there have been open verdicts, as that a person was found drowned, or found dead, and there was no proof as to how he came by his death, are not included ?—I think that they are not; those are given under distinct heads. I argue from this,—that death to certain people criminally inclined, or in a desperate state of mind, or misery, or suffering, or under the impulse of any feeling, is not such a great event after all. When the mind is calm and in a reasoning state, death is doubtless the greatest event which can possibly be anticipated, but when the mind is in a state of paroxysm it is totally different.

1948. (*Mr. Waddington.*) In the year 1863 the number of verdicts of suicide or self-murder was 1,385, and the number of open verdicts, "found dead," was 2,397 ?—It seems so.

1949. (*Mr. Bright.*) You will, I suppose, conceive it possible that out of that larger number some of those cases in all probability were suicides, although that fact was not established ?—It is possible, and that would add to the number already given.

1950. (*Mr. Waddington.*) Some would be suicides and some probably murders ?—Yes, and some accidents.

1951. (*Chairman.*) Then you argue from that that the punishment of death is too light ; I think that that was your expression ?—That it is not such a deterrent as persons might at first sight imagine.

1952. You said, I think, that in one sense it was too light, and that in another sense it was too rigorous ?—Yes, that whilst it is too rigorous for the Judges and juries to inflict yet to certain states of mind (not to all) it wants that terror which it would have upon others, and that therefore it is not sufficient as a deterrent from crime.

1953. (*Mr. Bright.*) By "too light" you mean too little deterring ? —Yes ; not too light in its proper sense. So far as the rigour of the punishment, there is no greater, but it is too momentary ; it is summary ; it is a thing which must be got over and done with ; it is not, in my opinion, in that sense as rigorous as punishment for life ; and I am supported in this view by Beccaria. I will not trouble the Commission by reading it in Italian, but I have a translation. Beccaria says, "It is not the intensity of the penalty which "has the greatest effect upon the human mind, but its extension, "since our feelings are more easily moved by small but repeated im- "pressions than by a strong but passing movement. The empire of "habit is universal over every feeling of man, and as man speaks and "walks to procure his wants by its help, so the moral ideas are stamped "in the mind only by durable and repeated shocks. It is not the "terrible but passing spectacle of the death of a wicked man, but it is "the long and hard example of a man without freedom, who having "become a beast of burden or a slave recompensing with his labour that "society which he has offended, that is the strongest check against "crimes. That is efficacious because it is often repeated. The thought

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" 'I shall be reduced to this long and miserable condition if I shall " 'commit such mischief,' is much more powerful than the idea of " death, which men can never realize." Another reason which I have against Capital Punishment is, that I do not consider that it is defended by natural law or by right reason. I do not speak of the natural law which is common to all animals, of which we might take instinct as a basis; but that natural law which is common to men only, and not to animals, and which is guided by reason. The instinct of nature might point to the hands as given to man in the same way as the horns given to animals for self-defence; but man is a superior being, and has his reason to guide his acts. Instinct would lead to the *lex talionis*, to revenge, and to retaliation by killing a man who has killed another, regardless of consequences; but reason tells us that we must resign this duty to the State. And what does reason enjoin to the State? It tells the State that it should give such punishment only as is required, only such as shall prove a deterrent, and efficacious for the purpose of punishment, and for the protection of society. If the State, therefore, determines to be guided by what is really required by the dictates of reason it will only do no more than what is demanded for the protection of society, for the proper punishment of the criminal, and in order and with a view to his correction. Suppose then the State (taking the State to be a moral person) should find that the protection of society can be attained by imprisonment for life or by transportation, in short, by putting the man who has violated the laws of society out of the way, so that he shall not be able to do it again, the object would be thus accomplished by its so doing, and the State should go no farther. Reason does not demand of the State to act with vindictiveness against the criminal, it can only demand of it to punish him with a view to his correction; that seems to me to be the only demand of natural justice and reason, both to individuals and to the State. Whilst speaking of vindictiveness, I may say that it is wrong, both for the State and for any individual to have any punishment based upon vengeance, as it is inconsistent with that charity which religion and humanity suggest and enjoin upon us. This charity enjoins us to be kind, gracious, and merciful, even to the criminal and to the worst of men; and it is far from countenancing vindictiveness unto death. The Bible says, " Vengeance is mine, saith the Lord; I will avenge."

1954. (*Chairman.*) Before you go to any other branch, will you explain why it is that you consider the punishment of death more vindictive than the punishment of perpetual banishment?—Because in one case there is the chance of reformation; the man may become a better man during his imprisonment; in the other case he is cut off at once.

1955. Supposing the man to become a better man whilst he is undergoing this perpetual banishment, working, as you have told us, like a slave, what would be the effect? Would you propose then to remit the punishment?—No; I do not propose to remit the punishment. I am not touching upon that question. I am merely touching upon the general question that to punish a criminal with death is vindictive, since it is inconsistent with the reformation of the criminal, and is more than is wanted for the protection of society. Society wants only that which is necessary. Anything beyond that takes the shape of vindictiveness.

1956. (*Mr. Justice O'Hagan.*) But although the reformation of the criminal is one object of punishment, the other object of punishment remains, and if the punishment should appear to be no more than what was necessary for the protection of society and the prevention of crime,

it would not necessarily be a vindictive punishment.—Just so; but seeing that the protection of society is the primary object of punishment, if that protection of society can be attained by putting the man out of the way by imprisonment for life, or by transportation, society is protected from that individual, and that is enough.

1957. (*Chairman.*) Will you proceed to your next point?—With reference to a controverted point as regards the teaching of the Bible, I would make a general observation. In looking back to the history of past legislation—whether of the Romans, of the Jews, or of the Greeks—we must have regard to the state of morals and civilization at the time when such legislation was enacted. If the Commission will allow me, I have a quotation from Wines on the laws of the ancient Hebrews, which I will read. He says:—"A wise legis- "lator, whether divine or human, in framing a new code of laws "for a people, will give attention to considerations of climate, of "religion, of existing institutions, of settled maxims of govern- "ment, of precedents, of morals, of customs, and of manners. Out "of all these there arises a general tone or habit of feeling, think- "ing, and acting, which constitutes what may be called the spirit "of the nation. The principle that laws must be relative to circum- "stances, that they must grow out of the state of society, and be "adapted to its wants, is founded in reason and confirmed by ex- "perience. It is, therefore, a just and solid principle, and must com- "mend itself as such to every enlightened judgment. But it involves "the clear and certain inference, that God never intended the Mosaic "laws to bind any nation but the Hebrews, and that it would be quite "foolish to detach particular parts from the rest, and to attempt the "engrafting of them on other systems to which they must prove "incongruous. The fundamental principle of the Hebrew polity, the "suppression of idolatry and the maintenance of the worship of the "one true God—so diverse from that of every other government ever "known among men—could not but enter essentially into the frame "of the laws. Besides this, the circumstances of climate, soil, situation, "political relations, character and power of the neighbouring nations, "customs, mode of life, prevalent notions as to honour and disgrace, "and the nature and severity of punishments, species and sources of "crime, kinds of disease, &c., &c., would modify a divine, quite as "much as they would a human legislation, and still more, perhaps, in "proportion to its superior wisdom. If God were now, by special "revelation, to enact a code of civil laws for every nation on the "globe, it is not likely that any two of them would agree in every "particular."

There is another reason which seems to me to be important for the purpose. There are two guides to the intensity of the punishment—one is the atrocity, and the other the frequency of the crime. With regard to the atrocity, it may be said that murder is in all cases the highest or most atrocious crime as respects the person injured, yet as regards the person committing it the atrocity will be different in proportion to the concurrence of the will in the act. A person committing a murder from an impulsive instinct, or in consequence of a brawl, is guilty of much less criminality than a person committing a murder after long premeditation and out of vindictiveness. In the one case reason may not concur at all—the person is in a state of aberration or of excitement. In the other case the reason has concurred in the act, and the criminality consists in harbouring such evil thoughts for a long time and in making his reason concur in the act.

1958. (*Mr. Ewart.*) Do you not think that a man may brood over a

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thing so long that it becomes what is called a monomania?—No doubt he may; but still the very fact that he has been thinking all along of committing this crime, even the monomania is criminal.

1959. (*Mr. Justice O'Hagan.*) The fact that he has not exercised his will in resisting it?—Quite so; it seems to me that that should modify our estimate of the kind of murders generally committed. We have not in this country the statistics of the motives of crime as they are given on the continent. At the last International Statistical Congress held in London, when the question of judicial statistics was discussed, it was recommended that, as far as possible, the motives of crimes should be given, and I think that if we had the motives of crimes from the facts brought before the Court, not only, as the Judicial Statistics now give, in the case of those actually executed, but in the case of the 127 persons apprehended for murder, we would see much better what degree of atrocity attends the majority of murders committed, and that might very much modify our notion of the punishment. In fact I am of opinion that if we had the motives of crimes registered we should find that in this country the greater number of murders arise out of brawls and impulsive circumstances, and not from long premeditation and vindictiveness. But I am now speaking, in a manner, in the dark, because we have not the exact facts before us. Passing from the atrocity to the frequency of the crime, I have before me a diagram of the frequency of crime. There was recently published in France a magnificent work by M. Guerry upon *La statistique morale de l'Angleterre, comparée avec la statistique morale de la France,* and it gives a comparison of the number of murders in France under the general term *assassinat* and *empoisonnements,* which correspond with murder in this country. I find from this table that in France the number of murders committed in certain departments, such as Corsica, is much greater than the number committed in other departments. I would submit that when a crime is exceedingly prevalent in a country the legislation must be necessarily more severe. Four or five years ago there was a good deal of garrotting in England, and Parliament increased the penalty for garrotting; and in the same manner if it were found that in any district the people are much addicted to murder, the frequency would suggest a heavy penalty, something higher than usual. But where, as in this country, the crime is pretty even, and spread over the whole country in small proportions, there is no justification for an excessive penalty. Taking the numbers of murders committed, as given by the police, in each police district, it appears that in some cases there were one, in some cases two, in some cases five, and only in the metropolitan district, comprising nearly 3,000,000 of people, there were ten murders committed. Therefore, in no part of the country murder is committed in any great excess, suggesting or compelling the legislature to use excessive means to repress the commission of that crime; what in short might be suggested in France as regards the department of Corsica, would not be suggested from the facts of the case in this country. Again, if you compare the number of murders with the population, as a whole, it is very insignificant. If you compare the number of criminals per cent. on the whole 21,000,000 in England and Wales, even taking the 200 crimes committed, the proportion is exceedingly small. The security of life in this country is very great, and the amount of danger incurred by the people from this crime very little. In the same way, in the case of a railway accident, when it does happen it seems very fatal; but when the number of persons injured is compared with the large number of travellers it becomes very insignificant indeed; and it seems to me that when you have to introduce a punishment of a

very heavy character you must see whether it is demanded by the amount of danger incurred by the people.

1960. (*Chairman.*) Pursuing that line of argument, if you base anything upon it, would it not rather show that the punishment of death is deterring?—I am now speaking of the facts of the case; whether it does or not, I cannot say. I merely state the fact, that the number of murders committed is very small.

1961. You state that the amount of crime, as compared with the population, is very small, especially the crime of murder. If that is so, must there not be some reason why that crime is not excessive?—Yes; there are many reasons. The people are not addicted to it.

1962. Might not that lead to an argument that the people are not addicted to it, because if they were, they know that they would be hanged for it?—It is only a speculation to suggest such a cause. I merely state the facts. I do not think, from the reasons which I have already given, that the punishment of death is the cause of this small number.

1963. (*Mr. Justice O'Hagan.*) You draw, from the fact of the proportion being so small, the inference that the extreme punishment need not be inflicted—that, as I understand, is your argument?—Quite so. That there is no part of the country, so far as I have noticed from these facts, where there is such an extreme amount of frequency as to justify it. Perhaps I may explain how M. Guerry has brought out these facts. M. Guerry compiled a large number of facts. He has taken the number of murders and the number of persons condemned to death for England and Wales from 1820 to 1856, a period of 37 years, and in France from 1825 to 1855. Having ascertained the average of the whole of these two periods for each country, and for every district or department of each country, he reduced these averages to one unit in each case, and has shown the difference between one county and another by the difference between this average unit and the figures above and below. The work shows an immense amount of labour, and displays such scientific knowledge and mathematical accuracy as is beyond my power of praise. It is a magnificent work—a large folio—and the facts can be relied on.

1964. (*Mr. Waddington.*) What is the result of the comparison between the two countries?—The work does not give the exact facts, and much calculation is required to compare the one with the other.

1965. Has he not done all that?—No; the work wants an introduction to explain what the general proportion of criminality is as between England and France.

1966. (*Mr. Justice O'Hagan.*) Supposing that the proportion is very small between the crime and the population, and supposing that this Commission, or any member of it, came to the conclusion that death was the most deterrent punishment, and that small as the proportion is between the crime and the population, if the punishment of death were abolished, the proportion would be considerably increased. Would your argument hold?—I do not think that the proportion would increase.

1967. If one came to the conclusion that death was the most deterrent punishment, and that the crime was reduced by the maintenance of the punishment of death, and that whether the crime be large or small in proportion to the population, the crime would be increased by the abolition of the punishment of death, is it not clear that your argument would not be of any force?—Quite so; but it seems to me that the comparative fewness of the murders committed, taking all other things into account, should induce us not to introduce an exceptional system of jurisprudence and an exceptional punishment which really is

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not called for from any extraordinary frequency of the crime. Just the same as if garrotting diminishes, you may do away with the whipping.

1968. It might be said that you are introducing an exceptional diminution of punishment?—That is not my view of the case.

1969. (*Mr. Ewart.*) I understand you to argue that in England, as in France, taking the necessity which is maintained on the part of the advocates of Capital Punishment, the necessity lessens with the offence?—Yes. Another reason for the abolition of the punishment of death, and an important one, which I would produce, is the extreme uncertainty as regards the punishment. I find, from the same work of Monsieur Guerry, that the proportion of condemnations to death to executions was much greater in this country than in France. In England and Wales, in 37 years, from 1820 to 1856, there were 20,276 sentences of death, and only 1,202 executions, being in the proportion of only $5\frac{3}{4}$ per cent. In France, in 31 years, from 1825 to 1855, there were 1,979 sentences of death, and 1,260 executions, being 63 per cent. In this country $5\frac{3}{4}$ per cent. of the persons condemned to death were executed, and in France 63 per cent. The difference in the proportion is extraordinary; down to 1835 or 1836 the number of condemnations to death in this country exceeded all bounds, and then it went down to a very limited amount. Therefore the argument which I produce is that there is a very considerable amount of uncertainty as to the infliction of the punishment awarded by the Judges, and in proportion as there is the uncertainty, so of course the deterrent effect diminishes. The disproportion of the one to the other is much greater in this country than in France.

1970. Without comparing England and France, can you show from these figures that in England great uncertainty prevails?—Yes; it is only recently that the proportion of executions to condemnations has come nearer, but the disproportion is considerable. From the table which I have produced, 29 persons were convicted in the year 1863, and 22 were executed; that comes very near, but in former years it was different. The number of sentences to death, the proportion of that number for the crime of murder, and the number of executions were as follows:—

	No. of Sentences to Death.	No. of Sentences to Death for Murder.	No. of Executions.
1846	56	13	6
1847	51	19	8
1848	60	23	12
1849	66	19	15
1850	49	11	6
1851	70	16	10
1852	60	16	9
1853	55	17	8
1854	49	11	5
1855	50	11	7
1856	69	31	16
1857	54	20	13
1858	53	16	11
1859	52	18	9
1860	48	17	12
1861	50	26	15
1862	29	28	16
1863	29	29	22

1971. (*Mr. Waddington.*) Have you compared in the last 10 years the condemnations for murder and the executions in England with those of France?—No; but I can give you the number of condemnations to death. They were as follows:—

Year.	No. of Condemnations to Death.	Year.	No. of Condemnations to Daeth.
1851	45	1857	58
1852	58	1858	38
1853	39	1859	36
1854	76	1860	39
1855	61	1861	26
1856	46		

From 1851 to 1860, the proportion of the number of executions to the total number of condemnations to death was 56 per cent. The great majority of the remainder had their sentences commuted to hard labour for life.

1972. (*Chairman.*) Have you any other point to mention, as a general objection to the punishment of death?—It seems to me that such a punishment lowers the value of human life before the public and the whole country, and exalts the murderer, in many cases, to a hero. I cannot help thinking that so much being written in the newspapers, and so much published and placarded, and so much being made of the murderer, tends to produce a kind of estimation for the criminal rather than provoking the wrath of society against him. It seems to me that the great fault of the punishment is that it is irrevocable. In the case of the Saffron Hill murder the chances are that, if Gregorio Mogni had not come forward in time, the punishment of death would have been inflicted, probably on next Wednesday. There has been a decided mistake somewhere, if Mogni is shown to be the man who committed the murder; but if he had waited a week longer, Pelizzioni would have been executed. As an illustration, take the case of Mr. Barber, the solicitor, who was condemned for the forgery of a will, and transported. He had a full trial, he was convicted of forgery, condemned, transported to Australia, and there put to hard labour for many years. Subsequently something occurred which showed that he was not guilty. He was not dead; if the punishment of death had been inflicted it would have been irreparable, but the punishment of death had not been inflicted. Mr. Barber was recalled, got his liberty, and compensation was given to him for the trouble, and loss of health, and other things which he suffered. Not to make my evidence longer, I generally conclude by saying that, to my mind, the punishment of death is a revolting and demoralizing punishment; that it is unworthy of the civilization which we profess, and of the age in which we live; that it is uncalled for by any law, natural or divine; and that as a matter of prudence as legislators we should rather hide both the crime and the criminal than exhibit either to the gaze of the public. I am quite certain that persons who see crime in its most hideous aspect dwell on it and think on it, and if they are naturally badly disposed, or have any propensity to it, they brood upon it until they commit it themselves.

1973. (*Mr. Hardy.*) Would not that be an argument against public trials?—Quite so; I have not touched the question of public trials. I confess that I regard with great suspicion the good effect of the publication of these divorce cases and of all criminal cases in the newspapers. I think that it demoralizes the minds of the people; but a public execution is still worse.

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1974. (*Mr. Ewart.*) Even in the case of private executions, a publication would take place, would it not?—The publication to my mind is a most disastrous thing.

1975. Supposing the case of a private execution, you could not prohibit publication?—You could not, because it would be the only guarantee that the rich were treated in the same manner as the poor. In a few words, I condemn this punishment; because it is indivisible, immoral, unequal, irreparable, not reforming, not exemplary, and not efficacious.

The witness withdrew.

J. F. Stephen, Esq.

JAMES FITZJAMES STEPHEN, ESQ., examined.

1976. (*Chairman.*) You are a barrister-at-law?—Yes; I am a barrister of 11 years standing.

1977. On the Midland circuit?—Yes,

1978. And you have had considerable experience in the criminal law, and in law generally?—I have had some experience in law generally, and some experience in criminal law in particular. I have studied the subject and written a book about it.

1979. (*Mr. Waddington.*) You are a recorder, I think?—Yes; I am recorder of Newark-on-Trent.

1980. (*Chairman.*) Will you give us the result of your experience with regard to Capital Punishment. In the first place would you advocate its abolition or its retention?—Certainly its retention. If the Commission wish to hear the general grounds of my opinion upon that subject of course I shall be prepared to give them, but I think it probable that the Commission must have had so very much general speculation on that subject, that the opinion of one person more or less would be a matter of indifference to them.

1980*a*. (*Mr. Justice O'Hagan.*) I should like to hear your opinion?—If the Commissioners wish to hear my reasons they are, shortly, of the following kind: In the first place I think that Capital Punishment deters people from crime more than any other punishment, and I think that it deters them in two ways. I think that the effect of it is appreciable, and in some cases considerable, in a direct and ordinary manner, that is to say, when a man is going to commit a crime he thinks, "If I do this I shall be hanged for it." But I think that besides that there is a secondary effect of Capital Punishment. People are aware that murder is punishable by an ignominious expulsion from the world. They therefore get to consider murder as a very dreadful thing. They associate it with an ignominious death long before they have ever had any notion of committing the crime. When they come to consider the crime the idea presents itself to their minds with this association. In that way, I believe, the fact that murder is punishable by death is one reason why people think so badly of murder, though they probably do not analyze their own feelings. In my opinion, if you were to lessen the punishment inflicted for murder, people would regard it with less horror and detestation than they do at present.

1981. (*Mr. Ewart.*) When a man who stole a lamb, or a horse, was punished capitally, do you think that it produced the same effect?—I have no doubt that it had the same tendency.

1982. And you think that the punishment re-acted upon the crime and prevented its commission?—I think that the punishment must have prevented many persons from stealing sheep. Whether it was worth while to hang men in order to prevent sheep from being stolen is another thing.

1983. (*Mr. Bright.*) Do you think that at this moment, taking the case of Tuscany, in which for social crimes (I am not speaking of political crimes) Capital Punishment has been abolished for the most part of 80 years, the general sadness which would overspread a community on the commission of a murder, would not be quite as great as it would have been if Capital Punishment had been carried on there for 80 years as it has been with us?—I do not know anything about the state of society, or the national character, or the circumstances of Tuscany, and I therefore cannot give an opinion upon that point.

1984. (*Mr. Ewart.*) Is it not better to give your population a horror of the crime than a horror of the punishment?—I think that you give them a horror of the crime by giving them a horror of the punishment.

1985. Is there no other way more effectual and more desirable?—I think that there are other ways which are more effectual, but I do not see that those ways in any degree conflict with the infliction of Capital Punishment. There is education, for instance. I think that you may teach a man to see that it is very wrong to commit murder, and that that is a good reason why he should not do so; but I do not see why teaching him at the same time that if he does commit murder he will be hanged, should not increase the feelings which he derives from education.

1986. Do you think that Christianity is the great model for Capital Punishment?—I do not like to use such phrases. With respect to Christianity, one must go into such a very elaborate inquiry that I would much rather not enter into it.

1987. I merely put the question whether it is not more Christian to abolish Capital Punishment?—You must first define what is Christian; and in order to define it you must go into discussions which would be out of place here.

1988. (*Mr. Bright.*) Have you not written on this question?—I have.

1989. There are people who write without knowing, or reading, or considering; but I do not presume that you have done so. Have you never had your attention turned to this question as it has been illustrated in the later history of Tuscany?—Yes; but in what I have written upon the subject I have based what I have stated principally upon my own experience. I have done so because I have a most profound distrust of general statements with regard to the condition of feeling, or of society in any nation, and also because, from my own experience, I have, if possible, a still more profound distrust of all statistics which I have seen collected upon the subject. For that reason, in all that I have written, I have confined myself; and in all the evidence which I propose to offer to the Commission I propose to confine myself to my own experience, and to such general observations as any one can make without special experience.

1990. But if you found that at this moment, when Tuscany has been united with the rest of Italy, an attempt is made to introduce the general Italian law into Tuscany, and to re-establish Capital Punishment, and that the educated and cultivated and moral and religious population, whatever it be, of that province is apparently unanimously against the re-establishment of Capital Punishment after so long a trial, would you not be rather inclined to doubt the theory which you have formed, that life must be rendered more sacred, and the crime of murder less common by the infliction of Capital Punishment as it is inflicted in this country. Would not a large example like that rather shake your opinion?—I should find very great difficulty in coming to the conclusion that such a state of facts, as you suggest, existed. In

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order to draw any inference at all, I should require to know that the proposal to reintroduce Capital Punishment was unpopular amongst all the educated, cultivated, moral, and religious part of the Tuscan community. I should feel great difficulty in ascertaining whether it was or not. If it were proved to be unpopular amongst that part of the population I should further require to know what sort of people the educated, cultivated, moral, and religious Tuscans were ; whether their character was one which I admired and respected, or otherwise. I should require to know what the national character had been before this change took place, and whether I thought that it had been improved, or the reverse. Lastly, I should require to know a great number of collateral circumstances with which it is impossible that I should ever be made acquainted without great study, such as the cast of religious belief in the country, which has a great influence upon this subject, the kind of literature which they liked, and other things of that sort. All those things produce a very great influence upon the view which any country takes of such a subject as Capital Punishment. Unless I knew all this I could draw no inference at all from any alleged state of public opinion in any part of the population of Tuscany.

1991. Then in coming here do you exclude from your testimony, and in fact from your opinion, everything except that which you yourself have seen and observed in your practice as a lawyer in this country ?—Not quite so. I came here with a view to give evidence which I understood would be considered acceptable, principally upon these three points ; namely, first, the way in which the crime of murder is defined. Secondly, the mode in which the law is at present carried out, as to whether there is a difficulty in carrying it out or not. Thirdly, I am also prepared to give evidence upon a point which was raised in a letter which Lord Hobart addressed to the newspapers, and which I suppose has been before the Commissioners, namely, upon the question whether it would be expedient to lower the standard of proof upon which juries usually convict. Those are points upon which I can give evidence, which I hope the Commission may consider of some value. I have not made a study of foreign statistics, or of foreign countries. I have formed a general opinion, as I suppose most people have, from those general considerations upon which people write and talk.

1992. Those points which you have just raised are very important and are quite pertinent to our inquiry, and therefore I will not ask you any questions such as I was about to put to you ?—Perhaps I may say that I have not the slightest disinclination to give my general opinion upon the matter, and I have a strong opinion. I feel, however, that the Commissioners are the persons whose opinion is required, and that the witnesses are the persons whose evidence is required.

1993. (*Mr. Justice O'Hagan.*) You say that in forming your opinion you have judged very much from your own experience ?—I have.

1994. What experience have you had as a criminal lawyer?—I have been called to the bar 11 years. Since the year 1857 I have been engaged in 19 capital cases. Besides the 19 capital cases in which I have been counsel myself I have heard many others tried. Besides the trials which I have heard I have made a practice for some years past of reading newspaper reports of trials for murder. I have studied many such cases with great care. That is the amount of experience which I have upon the subject.

1995. (*Chairman.*) Will you give us the result of your experience ?—The results of my experience are principally with reference to the definition of the crime of murder. I will assume for practical purposes

that although high treason and piracy, and I believe one or two other offences, may be capital, yet substantially murder is the capital crime. The question is, assuming that Capital Punishment is continued for murder, how would you define murder? I have just said, in answer to Mr. Bright, that I have a very strong feeling of the unsatisfactory character of all the statistics which I have seen upon the subject. Upon the question whether juries refuse to convict for murder, I think that the proportion of acquittals to convictions is a very unsatisfactory guide. My reason for saying so is that, in my own experience, I have found that under the term "murder" there are included so great a variety of offences of the most different descriptions, that you get nothing at all from knowing how many people have been tried for murder and acquitted. Where death is caused in an illegal manner, in almost every case there is a committal for murder, and it goes down in the statistics as a committal for murder. A very large proportion of persons committed for causing death illegally, in whatever manner, are committed for murder.

1996. (*Mr. Waddington.*) A great many more are committed for manslaughter?—Of course.

1997. Nearly three times as many?—Yes. I have expressed myself imperfectly. I meant to say that wherever there is a doubt whether the case may not come within the legal definition of murder, there is a committal for murder, and a trial for murder, and that goes down in the statistics. Before I say anything with regard to the details of the definition which I venture to propose, I should like to state that I have heard the expression fifty times in Court, "Is this a real murder or not?" Where a particular case is given every one would say, "That is not a real murder; that is a child murder," or, "a manslaughter," or, "a concealment of birth." Therefore, what you want to get is not the proportion between the acquittals for what in the statistics is called murder and the convictions for murder, but the proportion between the cases of real murder, where the prisoners are convicted, and the cases of real murder where they are acquitted. Now, any one person's experience upon the matter must be very small, but I have analyzed 19 cases in which I have myself been engaged, and if I mentioned their circumstances shortly to the Commission, I think that it would support what I say, namely, that as far as my experience has gone I have found that there is no reluctance in juries to convict persons of what I will call, for the present, a real murder, although there is a considerable reluctance to convict them of murder if they have committed some of the acts which are considered murder by law.

1998. (*Mr. Bright.*) But not by the universal practice of the Courts and by the punishment?—No; of course in all these cases which I am about to mention there might have been a capital conviction, and there might have been an execution, but I will venture to say that neither the Judges who tried them, nor the counsel engaged, nor the counsel looking on, even for one moment supposed that the life of the prisoner was in danger. As often as not I say that they are improperly called murder.

1999. You exclude those cases from what you call real murders?—Yes. As far as my experience of real murders has gone I think that the jury are quite as ready to convict as they ought to be.

2000. (*Mr. Waddington.*) Do you think that they are unwilling to convict in the case of unreal murders because they think that the punishment is excessive?—Now and then they are; they will call a thing which strictly is murder, manslaughter, in order to prevent a

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capital conviction, but if the crime were rationally defined those cases would be defined as manslaughter.

2001. (*Mr. Bright.*) Or a second degree of murder?—I have a very strong objection to introducing a second degree of murder. I think that if Capital Punishment is retained the crime should have a definite name. "Murder" is a striking, well-known name, and I would define "murder" so as to include that class of cases in which people ought to be punished by death; that is my view of what the definition should be.

2002. (*Mr. Waddington.*) It would come to the same thing?—Yes. I will now, if you please, go through the circumstances of the 19 cases of trials for murder in which I was engaged, and I will show what proportion of them were really murders, and what proportion ought not to have been called murders. The first case was the case of a woman of the name of Mansfield Woolfit, who was tried for a child murder in December 1857, at Lincoln; she was acquitted. I have no very distinct recollection of the circumstances of that case.

2003. (*Mr. Bright.*) You have not the age of the child?—No; it was a new-born child; it was either a case of infanticide or a clear case of puerperal insanity, I cannot remember which. The next case was in March 1858, which was tried at Lincoln also, the case of a man of the name of Carroll or Carrott. He beat his wife and she died of it, and he was tried for murder; it was a very bad case of manslaughter; it was a case in which the question left to the jury was, whether the way in which he treated her was such that he ought to have known and must in reason have known that it was likely to cause her death, if so, murder; if not, manslaughter. The jury found a verdict of manslaughter, and if I had been upon the jury I should have given the same verdict. It was a very aggravated manslaughter but not more. I am trying to show the Commission that justice is done. The third case is the case of two men of the names of Carey and Pickett who were tried in July 1859, and were hanged.

2004. Where?—At Lincoln. It was a most brutal murder, they waylaid an old man and beat out his brains for the sake of 1*l.* 3*s.* 6*d.*, which he had in his pocket. The next case was tried at Derby on December 19th 1859. It was the case of a woman of the name of Allridge. It was a very curious case indeed, it was the murder of a new-born child by the grandmother. The child had been buried, and the question was whether it had been buried alive, or killed first and buried afterwards. In that case the medical evidence broke down, the prosecution withdrew from the case, and the woman was acquitted; that was a right result. The next case is rather an instructive one; it was the case of a man named Moody who was tried for murder in March 1859 at Lincoln. It was a curious case; Moody was going home and he met a man with whom he had had a quarrel, and the next morning the man's body was found in the water in a large drain. The medical evidence was that he had died from drowning, and it appeared on the whole that Moody must have knocked him down first and thrown him into the ditch afterwards. It was suggested for the defence that there was a fight, that Moody knocked him down, and that thinking that he had been killed in the fight, he threw him into the drain in order to give it the appearance of an accident. The jury found him guilty of manslaughter. I remember that, as I was coming out of the court, one of the jurors said to me, "It was a right verdict, but I cannot see what "evidence we have had that they had been fighting." He meant to say that substantially the man ought not to be hanged, but that they had violated the definition in order to meet the substantial justice of

the case. According to the definition which I would suggest, that would not be murder; I think that the definition is too loose.

2005. (*Mr. Neate.*) Do you mean to say that assuming that there was no fighting and that he pushed him into the ditch, it would not be murder?—That, no doubt, would be murder; but suppose that there was a fight, and that he knocked him down and threw him into the ditch.

2006. Did not the verdict proceed upon the fact that there had been a fight?—The jury thought that there had been a fight.

2007. Upon your statement, that is a case of a wrong verdict?—It is a case of a wrong verdict according to the present definition.

2008. But, according to your definition, would it be a right verdict if there was no fighting?—I have not come to the definition yet, and I would rather not explain myself till I do. The next case was tried at the same assizes. It was the case of a man named Peel; he had a servant, and there was a very exaggerated story of his having used him brutally when he was ill. The case ended in his being convicted on another indictment for a common assault. He got six months' imprisonment, and I have no doubt that it was a perfectly right verdict. The jury acquitted him of the murder upon the evidence. Another case was the case of a woman of the name of Ulyatt; she was tried for murdering her child; it was obvious that the child had died by accident, and the Judge stopped the case, and there was an acquittal, which was right again. The next case was that of a woman named Dodds; it was a poisoning case. Upon the evidence it was extremely doubtful whether she had poisoned her husband or not. One point, which I have no doubt saved her life, was, that this man used to rub his gums with arsenic in order to cure the tooth-ache. It was urged for the defence that if the man rubbed his gums with arsenic there was no saying that he might not have put it into his tea or anything else, and the consequence was that the jury acquitted her.

2009. (*Mr. Bright.*) That was a right verdict?—It was a verdict which the jury had a perfect right to find; one cannot say that it was wrong.

2010. They acquitted the woman altogether?—Yes, upon the evidence.

2011. Supposing that the punishment had not been capital, do you think that they would have acquitted her?—I can hardly give an opinion, but I think that it was very desirable that she should be acquitted, because the evidence was very doubtful.

2012. Will you answer that question if you can?—I think that they ought to have acquitted her, and I incline to think that they would have done so, although I quite admit that if there was anybody on the jury who happened to object to Capital Punishment, that might make a difference; I have known scores of cases, not capital, where people have been acquitted on as strong evidence as that.

2013. Do not you think that, taking the average of jurymen, there is a natural disposition, if they can consistently, even with what you may call a strained view of their duty, to let a man escape the gallows?—Not more, I think, than there ought to be. The jury must have a certain discretion, and I think that they acted fairly within their discretion when they acquitted that woman, and I do not think that Capital Punishment had anything to do with that verdict. The next case was that of a man named Richardson; he shot a policeman who met him coming home from poaching. That man was convicted of murder and sentenced to death, and was fortunate enough to be reprieved. I do not know why; however he was reprieved. The jury at

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all events convicted him, although it was a capital case. The next case was the case of a man named Wyatt, and five others; they were tried for a most hideous murder of a prostitute; it was the most loathsome case that I ever was in, but the medical evidence was so weak that it completely broke down. Those men were committed for murder; but, by the Judge's direction, a bill was sent up for manslaughter, and they were tried for that crime, and acquitted of it.

2014. (*Mr Neate.*) They were acquitted altogether?—Yes.

2015. (*Mr. Waddington.*) The prosecution did not prove the cause of death, I suppose?—No; they were acquitted, and legally acquitted, but they were not in peril of their lives. The next case was the case of a woman named Wilson. It was a singular case. She drowned four of her children. She was obviously mad, and she was acquitted on the ground of insanity. She said, "I would rather that they were dead than that they used bad language." The next was a very clear case of a man named Smith, who shot his father at Derby. He was convicted and hanged.

2016. (*Mr. Bright.*) In what year was that?—The summer circuit of 1861. There was another person, whose name I have now forgotten, who was tried at Warwick in the summer of 1862, for deliberately shooting a fellow servant, and he was also convicted and hanged upon very clear evidence. There was another case, which was a very curious one, and which made a great noise at the time. It was the case of Garner and his wife, who were tried at Lincoln for poisoning. That was the only case in which I ever was engaged myself in which it was quite clear that there was a miscarriage of justice in a capital case. But the circumstances of that case were so very peculiar that I think they can hardly be repeated. The trial came on at the end of the assizes in the middle of the day, and it went over to the next day. The under sheriff had got it into his head that the jury were not to have proper accommodation when they were locked up at night. The consequence was that they were locked up all night in a close room with no beds, and very little food, as far as I remember, and they came into the Court the next morning half asleep, and so were in such a state of exhaustion that they positively were not fit to try the case at all. Manslaughter had never been suggested by either of the counsel, but the Judge, in summing up, suggested that the jury might return a verdict of manslaughter, which they immediately did. I have no doubt at all that in that case the circumstances of the jury went for something, and I have also no doubt that the objection to Capital Punishment under those circumstances did weigh in that case. The prisoners were convicted of manslaughter, and sentenced to penal servitude for life. It was as clear a case of murder as ever was tried in this world, and the sentence showed what the Judge thought of it. There were two cases against them. I was very anxious to go on with the second case, but the Judge positively forbad me, and therefore no evidence was offered upon it. I admit that in that case the jury were wrong. The next was a very notorious case, namely, Townley's case. The jury there returned a verdict which was clearly right.

2017. Were you engaged in that case?—Yes; I was counsel for Townley with Mr. Macaulay and Serjeant O'Brien. The next case was a case of a man named Beere, which was one of great violence, and hovered between murder and manslaughter, and the jury found a verdict of manslaughter, and I think rightly, in fact the Judge almost directed them to do so. The next case was a case of a man of the

name of Hall at Warwick; he was convicted of murder according to law, but strongly against feeling. *J. F. Stephen, Esq.*

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2018. What do you call Hall's crime ?—Clearly murder ; there was another case of a woman whose name I have forgotten, who was convicted of concealment of birth, upon an indictment for murder, and I think that, technically, it was right that she should be so convicted, because the medical evidence broke down, and did not prove that the child had been born in the legal sense. Lastly, there was a woman of the name of Easom, tried last summer, who was acquitted altogether; she was tried for murdering a child of eight or nine months old, by throwing it down a privy, and she was acquitted because the only evidence against her consisted in statements which she had made to a police constable, and which the jury no doubt considered had been questionably obtained. I am not prepared to say that the jury were not entitled to refuse to act upon that if they liked ; I have known juries refuse to act upon such evidence in common cases. I should not have been surprised at their finding her not guilty, if she had been tried for manslaughter. She was acquitted altogether, in consequence, no doubt, of the conduct of the police.

2019. (*Mr. Waddington.*) The evidence was the mere statement of the policeman ?—No doubt ; it all turned upon that. Those are 19 cases, and if you consider those 19 cases, I think you will say that in all those which in the common acceptation of language, you would call cases of real murder, with the exception of the case of the Garners, a proper verdict was given, and in all the others substantial justice was done. Therefore, as far as my experience goes, I should say that the law is carried out by juries at present, except in so far as it is opposed to justice.

The witness withdrew.

Adjourned to Thursday the 23d instant at 12 o'clock.

Thursday, 23rd February 1865.

PRESENT :

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
HORATIO WADDINGTON, ESQ.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Honourable Sir JAMES S. WILLES, one of the Justices of Her Majesty's Court of Common Pleas, examined. *The Hon. Sir J. S. Willes.*

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2020. (*Chairman.*) Your Lordship has been on the bench since 1855 ?—I have.

2021. You have had considerable experience in the administration of the criminal law of this country ?—I have.

2022. Will you favour the Commission with your views generally on the subject of Capital Punishment ?—Upon the best consideration which I have been able to give to the question, I think that Capital Punishment ought to be retained for murder, and for treason, subject to qualifications, without which the proposition I think would be untrue, because there are cases in which a man might be convicted of

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murder, and there are cases in which a man might be convicted of treason, in which, according to the present custom of England, Capital Punishment would not in practice follow. I think it necessary to state in the first instance that such qualifications exist, and in order to make my answer intelligible I am afraid that it will be necessary that I should state at large what I conceive to be the present state of the law with respect to murder, and also shortly, what I conceive to be the cases occurring technically within the definition of treason, to which Capital Punishment would be inapplicable. It will also be necessary (though perhaps it will be proper that I should, upon this part of the subject, stay until I am questioned before stating my opinion at large,) to consider whether those cases in which Capital Punishment ought not to be inflicted, (because it has now become the custom of the country, and is as fixed, I take it, as law, that it should not be inflicted,) should be distinguished from cases in which it ought still to be inflicted, by a legal definition of the crime, or by leaving the circumstances of each particular case to be considered under the head of the clemency or mercy of the Crown. I think that perhaps it would be better that I should take treason first. That is a subject very difficult to deal with, and which if it is to be recast I think would require a very long head and a very skilful pen. I speak not from speculation, because I know that when the last consolidation of the criminal law took place, it was intended that there should be a provision for the law of treason, and I do not think, that I shall reveal any secret when I say that I am aware that the late Chief Justice Jervis, a man of great experience, and of great subtlety of mind, and Lord Wensleydale were engaged in endeavouring to settle the statute which was to form part I believe of the Consolidation Statutes, and I believe that the result was that it was thought better not to deal with it at all until it became necessary to treat it as a separate subject. It is unnecessary to say more to show how exceedingly difficult, and in some respects technical, a subject that must be. I take it that the first principle, and perhaps the most useful principle to bear in mind, is that you should make law for cases which occur in practice, and especially with a view to those cases which often occur in practice, and speaking of what I may without a solecism call real treason, requiring to be dealt with as the greatest offence known to the law, the cases of such treason have been, in modern times, so rare that the attention of lawyers (certainly my attention) has not been much directed to the subject.

2023. (*Mr. Waddington.*) Did not Chief Justice Jervis himself, when he was Attorney General, procure the passing of an Act which in all probability will render indictments for treason very rare indeed?—"The Treason Misdemeanor Act," I think it is popularly called. I was going to mention it at a subsequent period. I was going to speak of something which took place in the House of Commons in the discussions which led to that Bill being passed, but I ought not to do so. I think that it is out of my line, and upon consideration, I shall not say what I was about to say with reference to the objections which were raised to the passing of the Act, suffice it to say that it exists.

2024. That Act will in all probability render indictments for what is called constructive treason very rare indeed?—No doubt, and as I see that the matter has been under the consideration of the Commission and that they have a clue to it, I do not think that I need say any more. It is only necessary to refer to the Statute of Treason, the 25th of Edward the Third, under which a great variety of offences were made treason, amongst others offences relating to the coin, which

have long since ceased to be so. Then there were offences which were made treason by the construction of the words "making war "against the King." One of the decisions I think was that the apprentices of London who conspired to destroy all bawdy houses were guilty of treason. It is enough however to have indicated my reasons for not wearying the Commission further upon the subject of treason. I do not think that I can usefully say anything more upon it, it is enough to indicate what I think. As to a case of real treason, —to take even the absurd case of John Frost,—it is impossible to say what mischief might not have been done but that the Mayor of Monmouth, Sir Thomas Philips, acted with vigour; otherwise great crimes might have been committed by that rabble, who thought until they were undeceived that they were a sort of army.

2025. (*Lord Stanley.*) I gather from what you have said, that you do not consider that the present law stands in need of any alteration as regards the crime of treason?—I cannot say that that is so, but I think that it is a subject which does not immediately press. I think it is clear that no person would be executed except in a serious case. I think that all of us within our own experience must be aware of the extreme clemency with which the Crown regards cases of treason, in which it is not necessary to make an example by inflicting Capital Punishment. I certainly should not say that the Act of the 25th of Edward the Third is an Act which I should have drawn for the first time as a treason Act.

2026. You consider as I gather from your statement, that some parts of the law of treason are antiquated and practically obsolete, but that there is nothing in the working of that law which causes any practical inconvenience?—That is my impression, I think that the sentence is not only antiquated, but barbarous; the notion of cutting a man into four quarters which shall be at the disposal of the King is a sort of indignity to the dead which might as well be omitted.

2027. (*Mr. Waddington.*) The Crown would of course remit that portion of the sentence and therefore it would not necessarily be carried out?—Just so.

2028. With respect to compassing the Queen's death, though not followed by any actual injury to Her person, you would still leave that a capital offence, as it now is?—Yes.

2029. You would not put the Queen in that respect upon the same footing as Her subjects?—I think that there is something so dangerous in any attempt upon the head of the Government, or that tends to dissolve society, and to produce civil war, that one cannot contemplate the consequences without horror.

2030. (*Chairman.*) With regard to the crime of murder, would you retain Capital Punishment for that?—With respect to murder I should retain Capital Punishment, and here again I must say, that I think that I should deal with the question practically with reference to the cases in which Capital Punishment is now inflicted; and I apprehend (speaking subject to correction) that Capital Punishment is not now inflicted in any case in which the death has not been caused by an act which the person who did it must have known to endanger life. When I say an "act" I again may be forgiven for guarding myself, because the law extends to the omission to perform a duty, under circumstances in which the person omitting it did so wilfully, and in order that death might ensue.

2031. (*Lord Stanley.*) As for instance a man leaving another in the water drowning, when it was in his power by reaching out a hand to

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pull him out?—That would be a case of very great difficulty, and more fit for a casuist than for a lawyer.

2032. (*Mr. Waddington.*) It would not be a case of murder as the law now stands?—I speak of the following case, which is nearer a practical one. I will suppose the case of the foreman of a mine, whose duty it was to hook on a certain chain, or to fix a certain plank, with reference to the safety of the other persons in the mine, and that it was necessarily his duty, in the sense that if he did not do so the people carelessly going down in the bucket, or crossing the plank carelessly, without the duty being performed, might tumble into the pit and be killed. Suppose that a person whose duty it was to do an act of that description, having a spite against some of the men who were about to go down in the bucket or to cross the plank, omitted to perform his duty, and that that omission of his duty he must have known would be dangerous to life. That, at present, stands upon the same footing as doing an act which you may either say according to common experience is dangerous to life, or which the person who does it knows is dangerous to life, which probably is the best form of putting it.

2033. (*Chairman.*) The fact of a man shooting at one person intending to kill him, and killing another person whom he did not intend to kill, is now murder?—It is.

2034. What would you do with that case?—As there is the doing an act which is dangerous to life, and further, there is the intention of taking away life, though the act takes away the life of B. instead of the life of A., I call it murder; the act is one which is dangerous to life, and the intention is to do an act which is dangerous to life, the act and the intention go together and death is caused. I am giving my own notion altogether, and to my mind the distinction is very fine, if there be one, between killing the man whom the murderer intends to kill, and intending to kill him but actually killing some one else; the intention is to take away life.

2035. (*Lord Stanley.* (Does not it come to this, that in sound reason you ought to hang the man (if you hang him at all), not for shooting one man whom he did not intend to shoot, but for attempting to kill another although he missed him?—I cannot help thinking with deference that that is a question of pleading, it is a question whether the allegation is proved; the allegation is, that the prisoner (leaving out the formal parts), wilfully, feloniously, and of his malice aforethought, did kill and murder A. B., then comes the proof; compare the proof with the allegation, they must both concur to convict him, the proof is, that he did kill A.B. by a deadly act, to put it shortly, that is *primâ facie* murder; you look for an explanation, and the explanation is, that he did not intend to kill A.B., but that he did intend to kill C.D., ought that to reduce the offence. I am not sure that that is anything more than a question whether the allegation is made out. The law as I understand it is that a person intentionally, without excuse or palliation, doing an act which he must know will endanger life, and causing death thereby is guilty of murder.

2036. (*Mr. Waddington.*) Supposing that if he killed the man whom he intended to kill, it would be manslaughter; his act would only be manslaughter in killing another person by accident, you could not make it a higher offence in killing a person whom he did not intend to kill than in killing a person whom he did intend to kill?—That I take it is quite clear. You must consider what the intention in the man's mind was, and the best way of illustrating that is by considering another case by which murder is reduced to manslaughter. A man is suddenly informed by some mischief-maker, or some mistaken

person, that another man has struck his wife, (I tried such a case at Maidstone,) he immediately pursues the person who he is informed has struck his wife, and strikes him a mortal blow whereof he dies. Is that murder or manslaughter, assuming that his blood has not had time to cool? It clearly would have been manslaughter if he had seen the blow struck. Is it the less manslaughter because he is informed that the blow has been struck and has not actually seen it? I was of opinion (always speaking of my own views), that that was manslaughter, just as much as if he had seen the blow struck. I take it that a blow struck either to a man himself, or to any person to whom he stands in the relation of master and servant, or parent and child, or husband and wife (or if one felt disposed to exhaust the list, lord and tenant, but that is matter rather of curiosity than of use); causing provocation, and acted upon by a blow which produces death, constitutes that death manslaughter, and not murder. I only put those cases in consequence of the question addressed to me, and in order to show that I do not think that the case put was an exceptional case, but rather one of a class.

2037. (*Chairman.*) There is another case which I would venture to put to you, namely, the case of a man shooting at a fowl with the intention of stealing the fowl and killing somebody on the other side, what should you rule that to be now according to the law as it is?—That is a case put by my Lord Coke in the third Institute, where he says that if a man shoots at a wild fowl sitting upon a tree, (I remember that he adds that particular, which almost makes it clear that he felt he was stating a paradox,) and accidentally shoots somebody, that is not murder; but that if he shoots at a cock or a hen, (there again I think that shows the spirit in which he was writing,) and misses it, and kills some reasonable being in the King's peace, that is murder. I should say with respect to a case of that kind, that at this day no Judge would direct or allow a jury to find a verdict of murder, unless the shot was fired under circumstances in which the person who fired it must have known that he endangered human life in doing so. Many of these old illustrations are inapplicable in the present day, because at one time all felonies were hanging matters, and it made no difference whether a man was hanged for a felony which he was attempting, or for a felony which he committed. I think that shooting at a fowl, and killing somebody accidentally would not be let go to the jury in that way; I think that it must necessarily be accompanied with the qualification, did he shoot under circumstances in which he must have known that he endangered human life? Of course none but a school boy out shooting at small birds, and into whose mind it suddenly came to shoot a fowl, would take up a fowling-piece for such a purpose, and with respect to him the magistrates I should have thought would not commit him for murder. I have never seen such a case, and I have never heard of such a case in practice. Here again you must look at what the law practically does, and at what does practically occur.

2038. (*Mr. Waddington.*) Until clergy was taken away from murder with malice afore-thought, by Statute of Henry the Eighth, it did not signify to a person whether he was convicted of murder or of manslaughter, the punishment was precisely the same?—No doubt. There was a difference under that Statute. I have looked at Mr. Neate's suggestion and the Statutes mentioned by Lord Coke, who adds a note "read these Statutes." I cannot find "murder" before the Statute of Richard the Second (13 Ric. 2. session 2. c. 1.).

2039. With respect to the benefit of clergy, until the Statute of

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Henry the Eighth, both murder and manslaughter were clergyable felonies ?—Yes.

2040. And therefore, a person who had benefit of clergy could not be hanged for either, but all persons who had not the benefit of clergy would have been hanged for manslaughter, as well as for murder ?—No doubt.

2041. That might have been a reason in those days for not making such a careful distinction between the two ?—Yes. With respect to the case of a fowl, has anybody known such a case sent to the Assizes ? But I can put a case which has occurred, and in which there might have been a bill for murder founded upon that principle. Felonies have increased under Statutes very much of late years ; a great many new felonies have been created since Lord Coke's time, and certainly it has not occurred to the legislature to add the qualification "provided "that if life be taken away in the course of attempting this felony it "shall not be murder." There is one case in which a person may have a very different intention, but in which death may be produced, and in which I take it it would technically be murder, and that is the case of procuring abortion. I recollect an indictment for manslaughter, which came before the Court for Crown Cases reserved, very soon after I was raised to the Bench. It came from the Old Bailey. A man who traded in procuring abortion had prescribed a potion which killed one of his patients, and he was indicted for murder, and the grand jury were, I think, told to find a bill for murder, but they found a bill for manslaughter. He was tried before the Chief Justice of the Court of Common Pleas, who reserved the question. There was something so unusual in a man being convicted of homicide, when his intention was quite different, and he was not present when the potion was taken, that the question was reserved. I think that it was a case in which he did not use an instrument ; he gave the woman a potion and she took the potion, and the result was that she died, and then the question was whether there was an administering within the Statute, it arose in that way. The Court held that it was an administering, and the conviction for manslaughter stood, and if the grand jury had sent down a bill for murder, I take it that the Judge would have told the petit jury that procuring death by felonious means, dangerous to life, was in law murder. That is the only case which occurs to my mind in which that sort of law ever comes into play. With respect to that case I recollect that I was very much struck by it, and I remember asking the Judge who tried the case what would have happened if the jury had found the prisoner guilty of murder, whether he would have been hanged. The judge said, "Certainly not; because I should have represented it to "the Home Office, and although this is a very bad crime, yet I should "look upon the death rather as an accident." Although, no doubt, numbers of people unfortunately do take such potions, yet as few are known to die of them, the man would not have been hanged. Speaking subject to correction, upon matters relating to the clemency of the Crown, I should think that a person would not be hanged even in a case in which a conviction could now take place founded upon the principle which I have mentioned.

2042. (*Chairman.*) Would you draw any distinction between the different descriptions of the crime of murder ?—I should certainly draw a distinction. There are cases in which I would not inflict Capital Punishment, although the conviction technically should be for murder. But to lay down a definition which shall meet all the varying circumstances in which I think that the clemency of the Crown ought

to be exercised, and the sentence not carried into effect, is a matter which I am quite unable to do; I think that it would be a mistake; I think that it would lead to technical refinements and distinctions and difficulties at the trial, and that it would in many cases be handing over the exercise of the discretion of the Crown, and indeed the question of legal guilt in some cases, to the jury, which is not desirable.

2043. (*Mr. Waddington.*) Then you would leave the law as it is, and would not distinguish by law between the different kinds of murder?—I should leave the law as it is, because I can only think of that one case. There may be others which have not come under my notice, but I think that in the mass of cases for which, if I may presume to say so, legislation ought to take place, namely, in cases of frequent and ordinary occurrence, and including almost all the cases which do occur, a man is not convicted of murder unless he intentionally, without excuse or palliation, does an act which he knows to be dangerous to life, or omits a duty, the omission of which he knows will endanger life. Connected with this subject there certainly is one point which I think worthy of consideration; I do not for my own sake desire that the power should be conferred upon the Judges, because I think that it would be a very difficult one and a very responsible one to exercise, but I cannot help thinking that it would be right to repeal the Consolidation Act of 1861, in so far as it takes away the power to record sentence of death, and to pass a new enactment which shall limit the cases in which the Judge may exercise the power. The law before the Act of 1861 was in a very confused state. There was first of all the Act of the 4th of George the Fourth, c. 48., which first gave the Judge power to record sentence of death, except in cases of murder. Then there was the Act of the 6th and 7th of William the Fourth, c. 30., which dealt with the time within which a person convicted of murder should be executed; before that, I think that it was on the second day. That was a mistake; it may have advantages, but it has greater disadvantages. I suppose that nobody would go back to that system. That Act enacted that sentence of death should be passed in the same form in cases of murder as in other cases; meaning, that the sentence was not to be immediately carried into effect,—that it was not to be carried into effect in two days. Then the question arose whether it meant to extend to murder the power of recording sentence of death, or whether it only dealt with the time within which the sentence was to be executed. Lord Denman thought it did extend to cases of murder; and he, in at least one case of murder, recorded sentence of death. Lord Wensleydale was of a different opinion; he thought that it only had to do with the two days, so that a grave doubt existed whether the Judge could in a case of murder record sentence of death. But these Acts applied only in the country—there was a separate Act for the Old Bailey; that was an Act which was passed when the Queen came to the throne, to prevent the necessity of the Recorder waiting upon her to receive the Queen's sanction to the sentence of death being carried into effect. In that Act there are two Sections which it is better that I should refer to, it is the 1st Victoria, chapter 77. That Act extended to all cases, and Section 2 enacted that the Judge might record sentence of death, in cases in which he thought that the sentence ought not to be carried into effect. Then there was a subsequent Section 5, which said that the Judge should pass sentence of death in cases in which he thought that it ought to be carried into effect. The consequence was that at the Old Bailey, it was clear that the Judge might record sentence of death in cases of murder, and I have known it done. In the country Judges did not record sentence

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of death, because there was a doubt as to the legality of doing so. Then came the Act of 1861, 24 & 25 Vict. c. 100. s. 2., which cut the knot, by saying that the Judge should pass sentence of death upon every conviction for murder, and should have no discretion. I must say that I think that that Act is a mistake. That power given to the Judges at the Old Bailey was a valuable power unless it was abused, and I am not aware that there is any instance of its having been abused. Of course it gave a wide discretion to the Judges, but it was a discretion exercised under the eye of the bar and of the world. In one respect I think that that Act of 1 Vict. c. 77. was defective, because it provided for the case in which the Judge thought that the sentence of death ought not to be carried into effect, and it also provided for the case of his thinking that the sentence of death ought to be carried into effect. But I cannot help thinking that there is an intermediate case. I cannot help thinking that there is a case in which the Judge may feel that murder has been committed, and in which he may say, "I ought not to decide this case, this is a case in "which I have not made up my mind that the prisoner ought not to "be executed, but it is a case in which I think it is better that the "discretion of extending mercy to him or not should be exercised at "the Home Office." Then in what sort of cases ought the Judge to exercise that discretion. I should have thought that in all cases where under the peculiar circumstances he is of opinion that sentence of death ought not to be, and would not be, with reference to the exercise of the mercy of the Crown in case he should pass such sentence, carried into execution, he should be at liberty to record sentence instead of passing it, and to inform the Crown or in fact the Home Secretary what he thinks is the sentence which should be substituted for the punishment of death, a recommendation which would be, I think, invariably acted upon.

2044. (*Lord Stanley.*) At present does not the case arise that the judge is obliged, or thinks himself obliged by the law, to pass sentence of death upon a prisoner at the same time that he holds out a hope to the prisoner that that sentence will not be executed?—I have not had such cases before me. I have tried a great number of cases of alleged murder, and I certainly will own that if I think that the case is one in which the prisoner ought not to be convicted and executed, I rather express my opinion by an intimation to the prosecution that it is unnecessary to proceed for the capital offence, which I do not hesitate to resort to in a proper case, or by dwelling to the jury upon the circumstances which appear to me to make it a case in which they may properly find a verdict of manslaughter, which they are always very willing to do, and which a Judge will direct them to do where there is any fair ground for it. I always endeavour to prevent people being convicted of murder, unless I think that, not only according to the law, but according to the established practice, it is the proper conviction. The commission is to administer what to justice appertains according to the laws and customs of England. I think that if, according to the established practice, a prisoner is not convicted and executed for a particular offence, it is a great scandal, and ought to be, if it can consistently with truth be avoided, that a Judge should pass a solemn sentence of death upon him

2045. (*Chairman.*) I understand you to say that you would think it difficult, if not unadvisable, to draw a distinction between the different descriptions of the crime of murder?—I would not do so by legislation.

2046. I also gather from you that you would think it advisable to re-enact the old law which gave the Judges the power of recording sentence of death in certain cases of murder?—Yes; imposing a more

stringent responsibility upon the Judge, by saying that he is only to record sentence of death in cases in which under the peculiar circumstances he thinks that the sentence of death ought not to be, and would not be, carried into effect.

2047. Is not that in effect drawing a distinction between cases of murder. I mean in this way, that the Judge would then have power to pass sentence of death upon a man guilty of murder in the first degree, or of the more heinous crime of murder, and that it would give the Judge the power of recording sentence if he did not think the crime sufficiently bad in its details, to warrant the man's being hanged? —I would put it rather the other way. I would make the Judge think positively that the circumstances were such that the man ought not to be hanged. I think that instances might be put.

2048. What objection would you have to giving the Judge the power of directing the jury under what head they should find their verdict; that if it was a case of murder, which he himself thought ought to be punished by death, he should direct them to find a verdict of murder, but that if he thought that it was a crime for which, if they found a verdict of murder, he would only record sentence, he should then tell them to find it merely a case of homicide, or a less offence than murder?—I think that there are two objections to that. There is first the extreme difficulty of defining it; in a definition you give something in the abstract, whereas it is the circumstances which after all determine whether, all the conditions of that abstract proposition being fulfilled, the man ought to be let off.

2049. Then what I understand you is, that each case must necessarily stand upon its own merits?—I think that cases in which men are not executed certainly ought to stand upon their own merits, you can hardly have a precedent, that is my first objection; but my second objection is one to the tribunal. A jury is not responsible, or ought not to be. One sees long discussions in the newspapers upon what this jury or that jury, or the other jury did, but a jury does not feel that; the jurymen return into the mass of society, they are lost sight of, and you cannot make them responsible. If you deal with a Judge you have somebody who may be made responsible, and besides you have somebody who has experience in the class of cases.

2050. (*Lord Stanley.*) And who is prominent before the public?—And who is prominent before the public, and who, if the Bench will forgive me, does not exercise his discretion otherwise than according to his judgment.

2051. (*Mr. Ewart.*) But if I understand rightly the Home Office would decide in these cases?—When judgment of death is recorded by the Judge although technically execution might follow upon it, because the record might be made up and it would appear that the man was sentenced to be hanged, yet practically it cannot, because it never has been done, and I repeat that this country is just as much governed by that which has usually been done, as by that which the law says may be done. The practice is clear that a man cannot be hanged upon judgment of death recorded.

2052. You seem to me to prefer that the Home Office should in these cases decide, from all the circumstances of the case?—I think that the prerogative of mercy ought not be taken away, and I think that it would be a miserable state of things in which a man might be hanged without anybody having the power to save him even at the last moment if circumstances appeared in his favour to justify it.

2053. Do not you think that the Home Office may in some cases be influenced by popular feeling in its decision, do not you think

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that it is rather objectionable in that point of view to have the law to be settled by the Home Office?—If instances can be produced in which it has been so influenced, and if those instances are sufficiently numerous to show that the danger is one which exists practically and is likely to recur, then the power ought to be taken away from the Home Office, but the only result of that would be, not that you would take away the prerogative of the Crown, but that the Crown would intrust its exercise to some other functionary.

2054. (*Mr. Waddington.*) Then, as I understand you, you are of opinion that a distinction ought to be made between murders of different descriptions, those of a more heinous nature in which the parties ought to be executed, and those of a less heinous nature in which the parties ought not to be executed?—That distinction exists, and I think that it ought to continue.

2055. You think that it ought to continue as it now is, with the single exception that the Judges ought to have the power of recording sentences instead of passing them in every case, that is the only change which I understand you to propose?—That is the only change which I propose. You are aware that I am a special pleader. Nothing fixes the thoughts so well and clears them so well, as putting them down in writing. I have been trying to put down in writing anything which would answer better, as a general definition, than the present law, but I cannot do it. I think that the Massachussets definition is very objectionable, the French definitions extends to cases in which our law does not impose death.

2056. Do you not think that the French law of murder upon the whole in the Code Napoleon is much more clearly defined than our law?—The French is a language of wonderful precision, but I should be very sorry to have the Code Napoleon translated and made law for this country. I think that there are many cases not provided for.

2057. Is it not clear that in the Code Penal there are many cases which you would put in murder of the second class, which are not murder?—I have read the Code Penal, and if you asked a French lawyer what the law was, I think that he would tell you that you must look at jurisprudence as well as at legislation. You would ask him, "What is the use of jurisprudence when you do not allow it to be "cited in your courts." He would say, "If it is not attended to, it is "the Court of Cassation will set all right."

2058. You are aware that what corresponds to murder in our law is not a capital offence in the Code Penal, but that the offences which are capital are distinguished by a different name?—Yes; I am quite aware of that, *meurtre* and *assassinat*.

2059. Therefore, the French law is quite upon a different basis from our own, murder is not a capital offence, but there are certain exceptions which are made capital, whereas, in our law it is just the opposite. Do you not think that it would be far better to draw that distinction by law if possible?—If possible, and if I could see a law not open to objection I should be very glad, but all I can say is that I have not been able to frame it. I have looked at trials in France, and I have also looked at the law with reference to giving evidence before this Commission, but I have rather a popular notion of it, than one acquired from books. Speaking of what has taken place latterly, much more has been left to the jury in France than I think is at all desirable.

2060. You are aware that in France extenuating circumstances were introduced in the year 1832, more than 20 years after the Code Penal was framed?—I know that it is a later introduction, but it shows the spirit of the people. The jury in France, I cannot help thinking, rather

lean against the Government than towards it, and those extenuating circumstances are a sort of safety valve. There are a great many proceedings in France which, perhaps, one does not understand sufficiently to state one's opinion of them.

2061. I am speaking not of the practice but of the Code itself. What you would propose would be, that the Judge should still sum up the law exactly as he does now, namely, that such and such acts amount to murder, though he is perfectly prepared at the same time to recommend that the law should not be carried out, when the jury have done their duty?—Yes, with reference to the circumstances. The great difficulty is of anticipating the circumstances under which Capital Punishment ought not to be inflicted, and of stating them in the indictment, and of bringing them before the jury in such a way that the jury will really pass a judgment, beyond a mere expression of mercy and a desire to let the prisoner off as cheaply as they can. I think that there are difficulties which are very formidable.

2062. These are difficulties which would be avoided to a great extent by a change in the law, because if they were able to find murder of the second class which was not capital, the difficulties would vanish at once; the difficulties arise from the fear of Capital Punishment?—You must then consider that you would try a man upon the whole of the evidence. You would frame first a count for murder in the shape of assassinat, and then your second count for murder in the sense of meurtre, and you would bring these before the jury.

2063. If it was clearly not a case of assassinat but of murder only, you would not have a count for assassinat?—I will take X to be punishable by death, and Y not to be punishable by death; you have your count for X and your count for Y, then the jury have to determine whether the facts prove the one or the other. A jury is no doubt a most excellent tribunal with reference to finding the facts, but I think that a jury is not a good tribunal for exercising a discretion as to the sentence, and the jury may find Y, in cases where the circumstances show X, from a notion of mercy. In some cases I think it possible that if the evidence is not quite satisfactory to their minds, the prisoner may be at a disadvantage, because I can quite understand a jury finding Y upon evidence upon which they would not find X.

2064. You think that in some cases they might find a second class of murder, even though the evidence did not warrant it, but should warrant an acquittal altogether?—That is to say in some cases in which it might not warrant X in their minds. In many cases the jury acquits, and the Judge says, "I cannot find fault with the jury for acquitting," but if the jury had convicted the Judge would equally have said "I cannot find fault with the jury for convicting."

2065. (*Chairman.*) I gather from what you have now stated that your desire would be, that there should only be one issue put to the jury?—That is so, according to the present practice.

2066. (*Mr. Waddington.*) Except the issue of murder or manslaughter, which must be put to them in every case?—Yes. A person sees another ill-treated and he kills the person whom he considers to be acting very cruelly, moved by good feeling; that would be murder, unless the person who was ill-treated stood in one of the relations which I have already mentioned; but hanging would not take place, you would not execute a man who interfered out of motives of benevolence. Then you will say "Why not pass a law that a "person interfering and killing another out of motives of benevolence "shall not be hanged?" I think that that would be very dangerous indeed, because it might be that benevolence was a pretended motive,

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and you might be satisfied from circumstances in the case, that it was in fact wreaking some old spite.

2067. Will you look at the definition of the law of murder in the State of Maine, and say whether you do not think that that would be an improvement upon the present law of England?—I do not understand what "express malice aforethought" means.

2068. Cannot you draw a distinction between "express malice" and "implied malice?"—No, I cannot draw the line where express malice ends and implied begins.

2069. By our law malice is very often implied, as distinguished from express malice?—Yes, but I think that that is a matter for lawyers and not for a jury. I think that you ought to tell the jury what is malice, whether express or implied.

2070. Would they not decide that under the direction of the Judge, in the same way as they now decide whether the crime amounts to murder or manslaughter; as I understand "express malice" there must be independent proof of malice?—I think that the words "express" and "implied" are eminently calculated to mislead a jury. What is the meaning of "express malice?" "Express malice," popularly, would mean, if the prisoner shows beforehand that he is going to kill the deceased, and "implied malice" would be if he holds his tongue, as a man in earnest would do, and kills by a mortal blow without previously disclosing his intention. What precise distinction there is as to guilt between "express" and "implied" malice I never could understand.

2071. You can have no difficulty surely in finding cases where express malice could be proved?—My understanding of "express malice" can only be made clear by an instance. Suppose the case of a man shooting another with a loaded gun, that *primâ facie* is murder. Then I will suppose the case of a man killing another by striking him with his fist in the chest; ordinarily that would be manslaughter, but suppose that he did it with a fixed intention in his mind to kill him, and that although the means used were apparently insufficient for the purpose they were rendered effectual in consequence of the state of health of the person struck, then would you say that "express malice" must be proved, that is to say, that you must prove that there was actually in the man's mind an intention to kill, and that it is wholly immaterial whether the act which he did was an act not calculated to destroy life? I tried a woman at Guildford, and some people were very much dissatisfied with the result. She persecuted a man with whom she had lived, and who afterwards married another woman; she at last took up a stone and came into his shop, and said "I will kill you," and struck him in the chest, and in consequence of secret heart disease he fell down dead of the blow, it being a woman's blow, which would not otherwise have been sufficient to kill him; but she had told several people that she would kill him. I told the jury that mere talk ought to be disregarded, and that it would be absurd to find her guilty of murder upon the ground of "express malice." The jury found her guilty of manslaughter. Had she used a knife, the implied malice would have been worse than the express.

2072. That does not arise in the present law of murder, because by the English law malice is always implied if a person does an act which he knows, or ought to know, would occasion death?—I should say which he does know would occasion death—you would not leave it to the jury that he ought to know, but that he knew that it was dangerous to life.

2073. In that case, therefore, malice is always implied, and therefore the question of express malice can seldom arise, because unless he knew

that the act would cause death he would not be guilty of murder at all?—The distinction between express and implied malice I think in all probability would not be useful.

2074. (*Lord Stanley.*) I gather from the general result of the evidence which you have given that you do not think it necessary or expedient to introduce any additional classification of offences, beyond that which at present exists?—I do not.

2075. That is to say, dealing with the law as it relates to murder?—That is so; there might perhaps be a more elegant formula than the present; but I think that the practical result would be that guilty people would get off upon distinctions raised upon words.

2076. (*Mr. Ewart.*) It would tend to unsettle the law?—I think that it would take years to settle the meaning of words, to begin with; I think that you would constantly have points raised, and a great difficulty in understanding what the precise meaning of the legislature was, though with a sincere desire to give it effect. If the language was different from that of the present law, I think that the mere use of new phrases would cause difficulty.

2077. Have you read the United States' definitions?—I have read the Massachusetts' definition.

2078. And you do not approve of it?—I do not for this reason, to take the latter part of it, I think that there is such an expression as the following, "crimes committed with atrocity or cruelty." That is very vague; what is atrocious in the eye of one man is not in that of another, and what is cruel to one person, or by one person, may not be cruel to another or by another. It would lead to such uncertainty as to be very objectionable.

2079. And the present law rests upon decided cases?—It does, and upon the usage of the Courts.

2080. (*Mr. Waddington.*) The present law rests upon decided cases, but the carrying of it out rests entirely with the Secretary of State, with the assistance of the Judges; whether the law settled by the decided cases is to be acted upon, rests entirely with the executive, with the assistance and the advice of the judges?—That is so.

2081. And that you prefer to a change in the law itself?—I for one do not object to it; on the contrary, (if it be right to say so in this presence,) in all the cases in which I have been consulted by the Home Secretary I am entirely satisfied with the result.

2082. (*Chairman.*) Have you found during your experience as a Judge that juries shrink from convicting in cases of murder, where the case is put plainly before them?—I think not in cases of real murder. I am obliged to use the word "real."

2083. (*Mr. Waddington.*) I think that I remember one or two cases before you in which the jury returned merciful verdicts of manslaughter, where the evidence would have justified verdicts of murder?—I never try (if it is right to try to get a conviction in any criminal case), to obtain a verdict of murder in any case in which I think that the prisoner ought not to be, and will not be, executed if convicted. I do not think that it is a part of my duty to do so. My duty is to administer the law according to the established practice as well as according to the letter of the law, and if consistently with truth you can arrive at a final conclusion on the case in the first instance, that I think ought to be done.

2084. Would not it be far better that the verdict which can be carried out should be found in the first instance?—Clearly.

2085. (*Chairman.*) Do you propose any alteration in the existing law with respect to infanticide?—I think that the present law certainly

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is in a very bad state. I think that a great many children meet with foul play under circumstances in which no sentence or adequate sentence can be passed upon the mother. I am obliged to come to the conclusion that a great many women kill their children in the course of birth, or soon afterwards, with a view to conceal the fact that they have had them, and they get off now altogether in cases where it appears that there has been no concealment of the dead body, so as to be a misdemeanor; and in cases where there has been concealment, notwithstanding that there are decided marks of foul play upon the body of the child, women get off, as every body is aware, because of the exceeding difficulty of proving not that the injuries were inflicted before the child was actually born into the world, but that the child died after being actually and entirely born into the world. I take it that the law is that an injury inflicted upon a child which has not been actually born into the world, causing death before it has been born into the world, even though it has breathed, does not constitute murder, but that an injury inflicted upon a child if it has been completely born alive, causing death after it has been so completely born, even though inflicted before it was so completely born, does constitute murder. I believe that that is the law; if the injury is inflicted before complete separation, though the death follows after complete separation, that is murder.

2086. (*Mr. Waddington.*) If the child is actually born alive?—Yes. Then you have this difficulty, but perhaps I had better defer that; it is right to say that there is authority to the effect that in such cases the mother is guilty of what is called a misprision, but the law of misprision is antiquated, and in truth you will never find an indictment in practice except for concealment or for murder. If that law of misprision could be revived, and if an injury inflicted upon a child unborn could constitute an offence of that description which would give rise to doubt, the Judge would not be able to inflict an adequate sentence, because the Acts which affect hard labour do not apply, and you could only impose a sentence of simple imprisonment. But practically I think it must be taken that there is no law applicable to that case by reason of the obsolete character of the law of misprision. Then you have those two cases. I think that the result is exceedingly mischievous. I should much rather that women were examined upon this subject than myself. Of course it is they who are the proper persons to judge of the feelings of people of their own sex, but if I can at all form any opinion as to the view which they take of the matter, the view which they take of it is one more serious than is taken by men, who naturally sympathise to an extreme degree with the sex, and especially with young women, the persons who generally are indicted for offences of this description. I believe that if they were judged by their own sex they would be judged very much more severely. However that may be, I cannot help thinking that the law in that respect is in a very unsound state. Where it is perfectly clear to the mind of the Judge, except judicially, that the child has been born alive, and that either by wounds inflicted afterwards, or during the time of the birth and causing death afterwards, the child has come to its death, yet the Judge is I think obliged in many cases to tell the jury that, in the absence of evidence that the child was alive when it was born into the world, they cannot convict; but then, he says, in cases where there is concealment "you may convict of concealment," and the jury immediately convict of concealment, and the Judge passes a sentence of imprisonment. I generally pass a sentence of 18 months' hard labour.

2087. (*Lord Stanley.*) Two years is the limit is it not?—Two years is the limit, but for some reason which I cannot well explain, as a rule

I do not pass sentences of imprisonment over 18 months. An impression has been produced upon my mind that imprisonment is a very much more severe punishment than penal servitude, and that imprisonment beyond 18 months is likely to produce effects which I need not enter upon here. If the jury convict of concealment I pass a sentence of 18 months, if in my own mind I have an intimate conviction that foul play has been used; if not, of course I pass a small sentence, because simple concealment is punished more by the exposure and loss of character than by the sentence passed in Court. But then comes the case of there being no concealment of the body, what are you to do with that case? there is no punishment at all.

2088. In such a case would not proof of grossly culpable neglect having caused the death of the child be sufficient to justify a verdict of manslaughter, although it might not be proved that there was any intention to take the life of the child?—Practically you would not get a verdict for that; the jury would not find it.

2089. (*Mr. Hardy.*) Would there not be exactly the same difficulty as in murder, in finding manslaughter, inasmuch as you would still require proof of the separation?—Yes, but I understood Lord Stanley to suggest that the misdemeanor should simply consist in gross negligence with respect to being delivered without endeavouring to obtain proper assistance. You have not got what Lord Coke calls, I think, "the reasonable being" in the King's peace until complete separation.

2090. (*Mr. Waddington.*) There might be a case of negligence to a new-born child, where if it was born alive it would amount to murder. There have been cases of murder for the exposure of a new-born child?—Yes; the law draws a line, and says that a reasonable being in the King's peace is not in existence until the child is absolutely separated from the mother, and then the maternal duty commences, and the neglect of the maternal duty after that time causing death would according to the circumstances justify a verdict of murder or of manslaughter, and I believe that in practice the verdict is a verdict of manslaughter. I recollect shortly after I came to the bench telling the jury that it was murder, and rather summing it up as a case of murder, but the jury found it manslaughter, and I was rather uncomfortable at having failed as I thought in my duty, either to the Crown or the prisoner, but a high authority whom I consulted said, "You "need not trouble yourself about it in the least, because the jury have "found what is the practical verdict."

2091. (*Chairman.*) I do not understand you to propose any alteration in the law as it at present stands, to meet those difficulties which you yourself have mentioned?—I think that there ought to be an alteration in the law. The Commissioners have had of course a great deal of evidence upon this subject, and have heard all the glaring cases of this offence, cases in which the child has been cut by a knife, and has had a string tied round its neck, and so on. I should propose a separate Act of Parliament upon the principle of the Treason Misdemeanor Act.

2092. (*Mr. Ewart.*) An Infanticide Act?—I would take away all the anomaly which belongs to the case at present. I would enable the Judge in this as in all cases to record, not solemnly pass sentence of death, even in cases where conviction of murder takes place, if it is known that it will not be carried into execution. I do not think that the acts against procuring miscarriage meet the point; it is not a case of abortion, it is the case of a full-grown child; it is not to produce a birth before the natural time. I think that you must have a distinct

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Act of Parliament; it would be nothing new in principle, it would be giving effect to what is stated in the books, that the injury to a child before it is born is a great misprision. I would define that, and say that any assault upon a child in the course of birth should be misdemeanor and be punished. I think that two years is not sufficient; I have tried cases in which women who have previously been convicted of concealment of birth under suspicious circumstances have been convicted a second time. I should say that they should be guilty of a misdemeanor.

2093. (*Mr. Waddington.*) Perhaps you would say in the course of birth or immediately afterwards?—I would have a distinct clause; I think that there should be a clause such as there is in the Concealment Act, there is a clause as to the child being born alive. I would have a clause to say that the prisoner shall not be acquitted because of its appearing that the injuries were inflicted after birth, or that the child has been born alive, or that a felony has been committed, following in that Lord Campbell's Act of the 14th of the Queen, which I think would apply; namely, that the Judge may in his discretion direct an indictment for felony. In most cases there would be a conviction for the misdemeanor, and an adequate sentence might be passed.

2094. (*Chairman.*) That would be for injuries during birth and how long afterwards? Do I rightly understand you to include after birth or only during birth?—If the injuries were inflicted after birth, and they could be proved by reason of the child having been seen alive, then the present law would apply; and if it is a wounding, or whatever it may be, it is within the criminal law, either murder or unlawfully wounding. No distinction occurs to my mind at present as to the time.

2095. Then this enactment which you would make would be to meet those cases in which the child cannot be proved to have been absolutely born, and to have had any distinct feeling?—Yes.

2096. (*Mr. Hardy.*) But if, upon an indictment for the other offence, that should be proved, it would not prevent a conviction under that enactment?—Quite so. To my mind, under the present law, crimes can be committed with comparative impunity.

2097. (*Lord Stanley.*) Is not that to some extent produced by the comparative indifference or apathy of public feeling upon the subject?—I do not think so. The persons who feel most have the least opportunity of expressing their feelings. I have taken some trouble to ascertain it. It is impossible to recite instances without mentioning names, which would be wrong, but I have taken some pains to ascertain what women think of the present state of the law and practice with respect to infanticide, and I believe that I am quite justified in what I said in the earlier part of my evidence. I do not want to go at large into it, but I am satisfied that there is a very strong feeling amongst women, not of a desire to hang or grievously punish such offences, but of a desire that there should be adequate punishment; and there is a sort of accompanying indignation at men dealing so easily with the matter (perhaps under a false impression).

2098. (*Mr. Waddington.*) You would not propose any change in the law where a case of child murder is clearly proved; you would leave that to be murder as it is now?—I think so. A child of three years old is killed by somebody to spite its father or mother; such cases are not numerous, but they have occurred, and I cannot conceive that it should not be murder.

2099. Or a child three months old; take the case of a stranger killing a child three months old to spite the father or mother, would

not that also be murder ?—Yes ; or in order to change the course of descent of property. *The Hon. Sir J. Willes.*

2100. (*Mr. Ewart.*) Does not the French law seem to hold infanticide in more abhorrence than the English law ?—This is a question of feeling. I doubt whether legal definitions ought to deal with matters of feeling. I cannot help thinking that that is a matter rather for the Crown. 23 Feb. 1865.

2101. (*Mr. Waddington*). It has been suggested that in cases of infanticide there should be a distinction in law between legitimate and illegitimate children, do you think that that could possibly be held as a matter of jurisprudence ?—The law does make some distinctions between legitimate and illegitimate children, but I think that the incapacities already attaching to illegitimate people are quite as large as they ought to bear.

2102. (*Chairman.*) Has your Lordship given the subject of public or private executions any attention, and if so what is the result ?—I do not think that I can upon that point give any assistance to the Commission, I have not been able to make up my own mind to approve of any change, but I have no opinion upon it sufficiently distinct to entitle me here to answer the question with any positiveness, one way or the other.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Friday, 24th February 1865.

PRESENT :

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
MR. JUSTICE O'HAGAN.
THE LORD ADVOCATE, M.P.
HORATIO WADDINGTON, ESQ.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., MP.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

JAMES FITZJAMES STEPHEN, ESQ., further examined. *J. F. Stephen, Esq.*

2103. (*Chairman.*) I think that you had on the previous occasion completed the list of capital cases in which you had been engaged during the last seven years ?—Yes. The first of the cases which I mentioned was in 1857 ; that would be just seven and a half years.

2104. What branch of the subject do you now propose to take up ?—I wish to explain to the Commission, if they will allow me, some of the inferences which I draw from that list of cases, and to show the reasons which induced me to give the particulars of them. The first object which I had in view was to show how very dissimilar the different cases which are included under the legal definition of murder really are, and so to show the great importance of adopting a better definition.

2105. That is with a view to classification ?—I should consider such a change an improvement of the highest importance, quite apart from the question of Capital Punishment. It would render the law more

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rational and more symmetrical. I may observe that if Capital Punishment were abolished, and a fixed secondary punishment (such for instance as imprisonment for life) were substituted, a new definition of murder would be even more important than I consider it to be at present. Many acts fall within the present definition which it would be monstrous to punish with perpetual imprisonment. That was one object which I had in view. Another object was, to support my general assertion that juries are in fact willing, with certain exceptions, to carry out the law as it stands. Though these 19 cases are the only ones which I have referred to, I have heard very many other cases of murder tried, perhaps at a rough guess twice as many, and, both from what I have seen and from what I have read, I entertain a very strong opinion that, with certain exceptions, juries and courts of justice generally are prepared to carry out the law as it now stands. Then, in order to show that that opinion was not given without reflection, I specified these 19 cases, with their particulars, as an illustration, and, as I believe, a fair illustration, of the general course of the law upon that subject. Those are the principal reasons for which I mentioned them. I will now, with the leave of the Commission, state the exceptions which I think exist to the readiness of juries to carry out the law. I think that there are certain cases in which they are not ready to carry it out, because the law, as it stands, violates the moral sentiments of the country. I would reduce those cases to the following heads :—

1. Cases of constructive malice.
2. Cases of infanticide.
3. Cases of great provocation.
4. Cases of suicide.

There are, first of all, cases of constructive malice.

2106. (*Mr. Waddington.*) That is to say, what the law calls implied malice ?—Yes ; cases in which the law defines certain acts as being murder which the public does not think of in that light. That is one class. Another class is the class of infanticides. After hearing many trials for infanticide, I can remember only one capital conviction taking place for that offence in my experience on the Midland Circuit, and in that case the woman was not executed.

2107. What was the age of the child ?—It was a new-born child. It was a Warwick case, which was tried quite lately. Those are two classes. The third class is the class of cases in which the law does not attach sufficient weight to provocation. I think that there are some cases of provocation to which an effect might be attached, which the law at present does not attach to it. In these cases the present definition of murder, as it appears to me, violates the moral sentiment of jurymen, and therefore makes it difficult and, I would add, undesirable to carry out the law as it stands. Besides that, there is one other case ; It is of such rare occurrence that I mention it merely for the purpose of symmetry, that is, the case of suicide. I do not think that anyone would wish to induce juries, even if it were possible, to give full effect to the legal theory which regards suicide as murder, and which therefore regards every person who aids in the commission of suicide as a principal in murder in the first degree, that is to say, as a murderer. I think that in these cases the law requires re-definition and re-consideration. I think that if the law were altered so as to meet the sentiments of the public upon these matters, a great part of the objection which is at present felt to Capital Punishments would be removed.

2108. (*Lord Stanley.*) You would treat suicide as a separate offence ?—Yes. I propose, if the Commission will allow me, to state exactly how I would deal with these cases The measure which I

would propose would, I am afraid, be considered bold, but I am myself convinced of its great importance and utility, as I have said, not merely in connection with the question of Capital Punishment, but in connection with the general question of the reformation of the law. I hardly know how far I have a right, in expressing my views upon this subject, to assume on the part of the Commission that technical intimacy with the details of the definition of the law of murder, which of course a practising lawyer is obliged to acquire ; but I think that if anyone will take the trouble of examining the progress of what I may call judicial legislation upon that topic for a considerable length of time, he will find that there has never been any attempt made in this country to define murder in a systematic or a scientific manner, but that the law upon the subject has been made bit by bit to meet particular cases as they arose.

2109. (*Mr. Waddington.*) The definition has always remained the same ?—The definition has always remained the same, and a different meaning has been assigned to it as cases arose. That is the same as saying that there never was any real definition.

2110. The old definition has been made to serve the purposes of justice as the Judges have supposed, as the case has arisen ?—Yes, the loose term "malice" was used, and then when a particular state of mind came under their notice the Judges called it "malice" or not according to their view of the propriety of hanging particular people. That is, in two words, the history of the definition of murder. I do not know whether the Commission will allow me to refer them to a book which I published called "A General View of the Criminal Law of England," in which they will find a chapter giving a history of the way in which the law of murder grew up, (*see* pp. 41, &c., and 115, &c.)

2110*a*. (*The Lord Advocate.*) I should like an illustration of what you mean by implied malice. The law of England differs from that of Scotland on this point ?—The following is the most glaring illustration of the point. It has been laid down that if a person kills another in the perpetration of a felony, the law implies malice. Stealing a fowl is a felony; therefore, if you shoot at a fowl with intent to steal it, and one of the shots hits a man, and he dies within a year and a day, the intent to steal the fowl being felonious the killing of the man becomes murder. That is the strongest illustration which I know, but there are others which might be mentioned.

2111. (*Lord Advocate.*) Implying malice contrary to the fact ?—Yes. The proposal thereforewhich I should venture to submit to the Commission is to adopt the definition of murder given in the Indian Penal Code. That definition was framed with extreme care by the highest authorities, by persons who were conversant not only with the English law but with the general principles of jurisprudence. My own impression is that if that definition is studied, if any one would take the trouble of looking at Roscoe's Criminal Evidence on the one hand and these articles of the Indian code on the other, and of comparing the two, (there is in Roscoe every conceivable illustration of killing people which can possibly be imagined,) it will be seen that in every case, or almost in every case, the question would have been left to the jury under the code which upon the principles of common sense you would wish to leave to them, if youhad to decide upon that case alone. I make that suggestion, and if any one chose to act upon it, he would then be able to see how far my observation is correct.

2112. (*Mr. Neate.*) What is the definition in the Indian code ?—It is an elaborate definition; I will read it if the Commission desire it.

2113. (*Mr. Waddington.*)It is a definition with various exceptions ?

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—I have looked to the definitions of the crime of murder which have been given in most of the American States, and which are given in the French law, and I have also looked at the definitions of the Roman law, and it appears to me that this definition is infinitely superior to any one of them, and is founded upon principles which they almost all either misunderstand, or at any rate do not apply in a proper manner. The definition is as follows:—It begins with the word "Except," which is rather awkward, and there are verbal criticisms which may be made upon it, and there are one or two substantial criticisms to which I should like to refer. The definition begins thus, "Except in cases "herein-after excepted, culpable homicide is murder if the act by "which the death is caused is done with the intention of causing "death." I should say that they had before defined justifiable and excusable homicide.

2114. (*Mr. Hunt.*) "Causing death" of course means causing death to a man, and not causing death to a fowl?—Of course. "Or, secondly, "if it is done with the intention of causing such bodily injury as the "offender knows to be likely to cause the death of the person to whom "the harm is caused." I presume that that would apply to the case of a person in an unusual state of health, who might be killed by some trifling act.

2115. Supposing that a person intends to do bodily harm to A. and does bodily harm to B. whereby B.'s death ensues, would that come under that provision?—No, that case is provided for in the next rule. I think that what I have just read is meant to provide for the case of persons in some special circumstances; but it should be observed that the culprit must know that his act was likely to cause death. For instance, death is caused by a slight blow given to a person suffering from aneurism. The question whether this would be murder or not would depend on the question whether the person doing the act knew its probable consequences.

2116. (*Mr. Waddington.*) That would be an enormous change in the law?—This is only one of several instances; you must take the whole definition together. "Or, thirdly, if it is done with the intention of "causing bodily injury to any person," (that meets Mr. Hunt's point, I think,) "and the bodily injury intended to be inflicted is sufficient "in the ordinary course of nature to cause death." If you fired a gun at a man's head, which would be likely to kill him, and you killed either him or anybody else, that would be murder under that section. "Or, fourthly, if the person committing the act knows that it "is so imminently dangerous that it must in all probability cause death, "or such bodily injury as is likely to cause death, and commits such "act without any excuse for incurring the risk of causing death, or "such injury as aforesaid." Those are the cases in which the killing is murder generally speaking, and then follow the exceptions. The first exception is, "Culpable homicide is not murder if the offender, "whilst deprived of the power of self-control by grave and sudden "provocation, causes the death of the person who gave the provocation, "or causes the death of any other person by mistake or accident." I should like to make a remark upon that. There are rare cases of manslaughter of the following kind. A man being furiously excited by violence by one person, returns it upon another before his blood becomes cool, and causes that other person's death thereby. There are one or two cases in which that has been held to be manslaughter, but I doubt whether the words of the Indian Code quite meet that case, and I think that a slight alteration might be made in that rule. Then comes the most important part of the definition. "Explanation.—Whether

" the provocation was grave and sudden enough to prevent the offence " from amounting to murder, is a question of fact." I understand that that is substantially leaving to the jury the right from time to time of deciding upon the amount of provocation which ought to reduce the offence from murder to manslaughter.

2117. It is so stated, is it not ?—Yes ; and after going through the definition I propose to make some observations of my own upon that part of it. The first exception, namely, the exception as to provocation, is subject to three provisoes, " First, That the provocation," which is to reduce the murder to manslaughter, " is not sought or voluntarily provoked " by the offender as an excuse for killing or doing harm to any person. " Secondly, That the provocation is not given by anything done in " obedience to the law, or by a public servant in the lawful exercise of " the powers of such public servant ; and, Thirdly, That the provo- " cation is not given by anything done in the lawful exercise of the " right of private defence." The second exception is that " Culpable " homicide is not murder if the offender in the exercise in good faith " of the right of private defence of person or property, exceeds the " power given him by law, and causes the death of the person against " whom he is exercising such right of defence, without premeditation, " and without any intention of doing more harm than is necessary for " the purpose of such defence." The third exception is that " Culpable " homicide is not murder if the offender, being a public servant, or " aiding a public servant, acting for the advancement of public justice, " exceeds the powers given to him by law, and causes death by doing " an act which he in good faith believes to be lawful and necessary " for the due discharge of his duty as such public servant, and without " ill will towards the person whose death is caused." The fourth exception is that " Culpable homicide is not murder if it is committed " without premeditation, in a sudden fight, in the heat of passion, upon " a sudden quarrel, and without the offender's having taken undue ad- " vantage, or acted in a cruel or unusual manner." Upon that there is this explanation. " It is immaterial in such cases which party offers " the provocation or commits the first assault." The fifth exception is that " Culpable homicide is not murder when the person whose death " is caused, being above the age of 18 years, suffers death or takes the " risk of death with his own consent." That is a very singular exception, which I do not quite understand.

2118. It is probably applicable to India ?—It is perhaps more applicable to India than to England.

2119. (*Mr. Neate.*) It admits the cases of duelling and suicide ?—I think that suicide ought to be provided for in another way ; and, with regard to duelling, I would leave it to take its chance, according to the other provisions.

2120. If you adopt the fifth provision, it admits duelling ; a man there meets his death by his own consent ?—Yes.

2121. (*Mr. Hunt.*) A great difficulty would arise as to what was sudden provocation ?—That I was going to remark upon ; that is the most important section of the whole.

2122. (*Lord Advocate.*) It is more the enunciation of a principle than a legal definition. You could hardly apply it without a statement of the facts of the case ?—Of course not ; but, as I understand the matter the object of a definition of crime is to enable the Judge to tell the jury, in the words of the Legislature, or as nearly as may be, what question they have to try, and I think that these principles or definitions, whichever you call them, would enable any Judge to do that.

2123. If you were to take those as legal definitions, and to oblige the

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prosecution to come up to them, or oblige the defence to come up to them, it would be difficult to do that from the generality of the words. As legal principles laid down for the guidance of the Judge, they are very valuable?—I think that there may be some difference between the English and the Scotch form of indictments; we do not draw indictments in the syllogistical form.

2124. The question is, whether when the Judge charged the jury he could bring the state of facts under the precise words of the definition. I can conceive a great many cases which would go round the words of the definition, and come so near to it that it would be difficult to exclude them?—If you will suggest a particular case, I will endeavour to reply to you.

2125. (*Mr. Justice O'Hagan.*) Is there not the danger that if you had a series of propositions you would not have those propositions exhausting all the state of facts which may exist, and that you would want a proposition for a new state of facts?—There is always that danger in definitions, and you cannot avoid it; but I think that it is so valuable to have a definite standard that I would have a definition. Before adopting the proposed definition I would apply this test. I would take some such book as Roscoe's Digest, and I would go through the cases which have arisen one by one. Then I would take the Indian Code, and say,—How could we have directed the jury in that case? That would show whether the code was sufficiently comprehensive, as we have collected in Roscoe the results of the experience of a great many years. No doubt cases might arise which would not fall within the definition, but this difficulty might be easily met, by saying, that if any case arose not provided for by these propositions, it should be dealt with in the same manner as at common law, that is, substantially, the Judges should do what they thought fit. I think that the importance of having something in general but definite terms, which any one can understand if he will read it, is so very great, that I would run the risk of such an occurrence.

2126. (*Lord Advocate.*) The fourth exception in the Indian code is, "Culpable homicide is not murder if it is committed without premedi- "tation, in a sudden fight, in the heat of passion, upon a sudden quarrel, "and without the offender having taken undue advantage, or acted in a "cruel or unusual manner." Before you could get the benefit of that you must prove all these things; first, that it was without premeditation; secondly, that the fight was sudden; thirdly, that the quarrel was sudden, and then that the offender had not taken any undue advantage (which is a very wide word), or acted in a cruel or unusual manner. I should like to know how you would apply that?—In order to answer that question I must suppose myself to be summing up, and I should read to the jury the section, or so much of it as might be applicable to the particular case in question, and then I should say, "Now, "in the first place, as to premeditation, of course you will consider "the circumstances of the case, Do you think that there was no pre- "vious quarrel, or that there was a previous quarrel? or that there is "no evidence of any quarrel?" This will probably lead you to say that there was no premeditation, or that there was premeditation. If there was premeditation *cadit questio.*"

2127. Supposing that there was a previous quarrel, but still no premeditation?—Then you would say to the jury, "You have heard the "evidence about this previous quarrel, you have heard what was the "man's subsequent behaviour, and the first thing which you will have "to consider will be, whether this leads you to think that he did pre- "meditate what afterwards occurred."

2128. That would be a distinct matter for them to decide?—You would then say to the jury, "If you think that there was no premeditation, the next question is whether this fight was a sudden one? "Did the parties, for instance, fight with a poker and tongs in a tap "room, or did they take deadly weapons and go out into a field and "strip, and prepare to fight in that manner?" All these are definite questions. Then, as to the heat of passion, you would say to the jury, "There was very bad language used. You will consider whether that "bad language was insulting and intentionally bad, or whether it was "the usual language of men in that class of life—in fact, whether or "not the parties were in a passion with each other." Then, as to the heat of passion upon a sudden quarrel, you would say to the jury, "Was "the quarrel which took place sudden, or did it arise from an old "grudge?" These are all matters upon which twelve men can form an opinion. Then, upon the question whether the offender took undue advantage, you would say to the jury, "The fight seems to have been "what they call an up and down fight in the North country, and "you know the habits of people in Lancashire, and you know whether "what was done would be considered fair play according to the habits "of the people, or whether it was an undue advantage, and would "usually be considered disgraceful and foul play." Then, upon the question whether the prisoner acted in a cruel or unusual manner, you would specify the particular things which were done. You would say, for instance, "He kicked the man with heavy boots. What do "you think of that? Suppose that a man kicked another six or seven "times after he ceased to resist, that would be cruel. If it was a "single kick, perhaps you would think it not cruel." That is the sort of way in which I think that a Judge would sum up upon that clause. Of course one could not, without the facts being all set out as you have them in a trial, say satisfactorily how it would be done, but that is the sort of thing which would happen; and I may say that, generally speaking, it would be very strange indeed if the Judge was required to leave all those questions to the jury. Generally speaking, a great many of the questions would answer themselves. The Judge would be able to say, "It is quite clear that there was no "premeditation, and that it was upon a sudden fight, in the heat of "passion, and the important question for you is, whether the way in "which the man acted was what you would call cruel or unusual."

2129. (*Mr. Neate.*) Supposing that there had been a previous quarrel between the offender and the victim, would he not be deprived of the benefit of the exception as it stands?—Unless the jury considered that the ultimate fight was a continuation of the original quarrel, I do not think that he would lose the benefit of it. If the men had quarrelled before, but the jury supposed that there was no continuing malice, but that the fatal quarrel was a sudden one, I certainly think that that would satisfy the words of that definition. The important section, as I have said, and the one which would produce the greatest change in the law of the country, is the section as to provocation, "grave and sudden "provocation."

2130. (*Mr. Waddington.*) Under the first definition of murder, supposing that a man in committing a highway robbery with violence did not use any deadly weapon, but knocked a man down with his fist, and that the man fell upon the kerbstone and fractured his skull and died, would that be murder or not?—I think not, under this definition, and I think it desirable that it should not be.

2131. Also if a person committed a rape without inflicting any injuries which would answer the definition, but if the woman died in con-

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sequence, would that be murder?—That would depend on the question whether the rape was obviously dangerous to life. Suppose a man ravished a little girl or a very weakly woman with great violence, and she died of it, it would be murder under the code, and I think ought to be murder.

2132. Suppose that she was not obviously weak, but latently so?—I think it is very hard that in that case it should be murder, and under the code it would not.

2133. Then you think that in that respect the English law should be altered?—Yes.

2134. And also in all other cases of violence where an injury is inflicted, and the man inflicting it had not reason to suppose that it would be fatal to the party, you think that the law should be altered? Yes; I think that in all cases the question of murder or manslaughter ought to be a question of intent, and I think that it is a misfortune to take the collateral question of a man being engaged in the commission of another crime as a test. I am quite sensible of the change which that would make.

2135. It would make a very great change in the English law?—It would; but I think a very beneficial change.

2136. (*Lord Advocate.*) But mainly all these definitions go to that?—Yes; their fundamental principle is that the intent makes the crime.

2137. (*Mr. Hardy.*) With respect to provocation you would no longer make it necessary to have the personal provocation of a blow, but any sort of provocation which stirred up a man's passions would be sufficient?—Yes; this definition would very considerably narrow the law of England in that respect. Assuming for the purpose of argument that murder is to be a capital crime, I think it a most important thing to exclude every case from the definition of murder for which a man would not be executed, so that if you can show that under the present law there are murders for which a person would not be executed, it is high time to alter the definition.

2138. (*Lord Advocate.*) How would you deal with those cases in which provocation has been great, but where the interval is considerable?—I was going to give my view of the whole subject of provocation, if the Commission will allow me. With regard to provocation I am inclined to think that the clause in the Indian code goes too far. It seems to me that some more definite rule as to provocation ought to be given. The difficulty of defining provocation beforehand really is the great difficulty of the whole question. Every now and then a case arises which it is very difficult to foresee, and where the feelings of the public are very strongly enlisted, and where the carrying out of the capital sentence might almost endanger the public peace, and would produce, it may be irrational, but still wide dissatisfaction with the law, and yet where the law is as plain as it can possibly be that the crime committed is murder. There was a case of that description which made a great noise at the time, which I happen to know about, namely, the case of George Hall, of Birmingham, which no doubt most of the Commissioners remember, where it was by the law a clear case of murder, and yet the public opinion was so excited that the people of Birmingham said that there was danger of riot. I should think that was not so, but still there was strong feeling about it.

2139. (*Mr. Waddington.*) Would not that be as clearly a case of murder by the Indian code?—Yes; unless the jury determined that it was not. There was grave provocation.

2140. But not sudden provocation, it must be grave and sudden?—That is a question for the jury. I am inclined to think that there was

sudden provocation, as well as grave provocation. I cannot help retaining my opinion that it was both grave and sudden.

2141. Do you maintain the opinion that it was proved to be sudden ?—I maintain the opinion that the jury had a right to find that it was sudden.

2142. Without evidence ?—I think that there was evidence.

2143. What was the evidence ?—The evidence lay in the behaviour of the man up to the time when the act occurred. The evidence was that the two people were in company up to a late hour upon very affectionate terms, and that the man had shown extraordinary forbearance and affection for the woman ; he goes out with her, shoots her, and in a few minutes afterwards is found in a state almost of unconsciousness, almost raving, declaring that he has shot his wife. The inference which I draw in my own mind is that something had passed between them which had excited him beyond bearing, and that he had shot her under provocation.

2144. That is the sort of inference which you think the jury have a right to draw under the Indian code ?—Yes, or under the law of England. If the suddenness of the provocation had been left to the jury, I believe they would have found for it, and I think they would have had a right to do so.

2145. That is the sort of inference which you think the jury ought to draw if the Indian code were adopted ?—I think that they ought. I think at the same time that the matter is left rather too much at large by these words ; and for the guidance of juries I should propose to specify a certain number of provocations, which the law considered sufficient to reduce murder to manslaughter ; the provocation of blows for instance, of adultery, and other familiar things of that sort, and with that guidance I would leave it to the jury. It would be a great change in the law, but I believe that it would be one which would meet nearly every case in which there is any difficulty upon the subject.

2146. You would specify some descriptions of provocation, and would leave the jury to find any others which they thought proper ?—Yes ; I am not prepared at this moment to give the words which I should suggest ; but I would word the section in such a manner as to put upon the jury the responsibility of saying, " There was a sudden " provocation which we consider equal in degree to one of these."

2147. But I think that the Indian code goes rather further. Does not it say that the jury shall be the judges whether it is sufficiently sudden and grave ?—Quite so, and there I think that it goes too far. I would leave a certain discretion to the jury in the matter, because it seems to me that the only rule which you can lay down, and the real thing at which you wish to arrive with regard to provocation, is the general sentiment of the country at large ; you wish to bring the law into harmony with the general sentiment of the public, and the jury are the representatives of the public sentiment, and therefore I would entrust them to that extent with that degree of power.

2148. Might not one jury represent one public sentiment, and another another, and would they not vary extremely ?—There would be some variety ; you cannot get perfect certainty in the matter, but I think that that would be a less evil than the occasional conflict which now arises.

2149. Would it not be very much as if under the present law it were left to the jury to say whether it was murder or manslaughter, without any direction from the Judge ?—I apprehend that the way in which provocation comes to be an element at all is that it rebuts malice, as it is called, and I would leave the jury a little more liberty than they

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now have. I think that they are very apt to take it without leave, and I think that that is a very great evil.

2150. (*Mr. Hardy.*) Would you withdraw the word "sudden"?—No; I would keep the words as they stand, "sudden and grave," and then instead of this explanation I would give several illustrations of a grave provocation, and I would say that if those grave provocations suddenly arose, it would be enough, or that if any other provocation which the jury would say was equally grave was suddenly to arise, it would be enough.

2151. The word "suddenly" seems to lead to great difficulty when you bring it to the particular causes of provocation, for instance, a blow you can quite understand; there is there a sudden provocation; but there is a kind of provocation, such as injury to a wife or sister, which would dwell longer upon a man's mind. Is the suddenness to be interpreted by the nature of the provocation, as a matter of time?—I think it is. I know there is a difficulty, but it is a difficulty inherent in the facts and in human nature, and you can never get rid of it.

2152. (*Mr. Waddington.*) It would not depend entirely upon the state of a man's mind, because some men are more easily provoked than others. Some men might be provoked almost to madness by a very slight provocation?—That, again, is a difficulty which we cannot overcome. The jury have to take an average under the present law. A jury is often asked whether they think the prisoner's blood had had time to cool. That of course differs in different men; but the jury take an average.

2153. You would leave it a little more at large than at present?—Yes, I would only give a little more liberty than at present, because I think that the jury are apt to take the law into their own hands and to break their oaths, and I think that unless counsel are very scrupulous and high-minded in the matter, there is a great temptation put upon them to ask the jury to break the law, which I think a man of honour should avoid more than anything else.

2154. (*Mr. Hunt.*) Supposing that a person saw a servant committing an act of theft, and went and informed his employer, and the servant immediately then and there murdered the informant, could you call that grave and sudden provocation?—No; I should say that that was no provocation whatever, but that, on the other hand, the servant was doing wrong and that the other man was doing his duty. I understand by "provocation" an act in which the person provoking is wrong.

2155. I am using the word "provocation" as that which would in ordinary language provoke a person?—The second proviso I think meets that point.

2156. Do you think that the second proviso does refer to it?—It is rather a straining of the second proviso no doubt, but my own view of it would be that it would be an abuse of language to call that provocation. I should say that if the man was doing what in itself was not only lawful but laudable, the other party had no right to be provoked.

2157. But he is provoked?—He is of course vexed and annoyed, but he ought not to be.

2158. (*Mr. Waddington.*) Is there not some expression in the Indian definition as to the offender being deprived of his self-control?—Yes.

2159. Will you read the provocation clause again?—"Culpable "homicide is not murder if the offender, whilst deprived of the power of "self-control by grave and sudden provocation, causes the death of the "person who gave the provocation, or causes the death of any other "person by mistake or accident." You might meet Mr. Hunt's criticism

entirely by introducing the word "wrongful." At any rate that is a question of expression, but if you look at the question of substance, I do not think that the difficulty arises.

2160. (*Mr. Neate.*) You would not conceive any provocation from past injury of any amount sufficient to reduce the offence of murder ?—On the contrary, it is evidence of malice. A man discovers that his friend has treacherously seduced his wife two years ago, and he discovers it six weeks before he has an opportunity of shooting him, and he then shoots him. (*Mr. Neate.*) Would you hang that man ?—Yes, I would.

2161. Do you not think that the very sight of a man who has done you such an injury as that, is a sudden and grave provocation ?—No ; not after a reasonable time. Supposing a man comes to another, and taunts him with it, and says, "I seduced your wife," and says it in a way which shows that he really did it, and that man kills him, that I think would be provocation.

2162. (*Lord Advocate.*) How would you deal with this case—A man comes home and finds his wife lying drunk upon the floor, he having done so often before, and he kills her—what would you say to that ?—The question is whether he knows that what he does will probably kill her.

2163. You would hold that that sort of provocation would not come within the rule ?—No ; because at that rate if a man disliked his wife very much, if she was very provoking and ill-tempered, or even extremely ugly, he might at last come home some night and kill her. I think that that would be murder. There must, I think, be some wrongful act on the part of the person provoking to make out a provocation.

2164. (*Mr. Waddington.*) In all these cases of a violent quarrel between husband and wife, which ended in the husband killing his wife, the jury would decide as they thought proper whether the provocation given was sufficient to reduce the offence from murder to manslaughter ; that is the change which you would wish to introduce ?—I quite admit that that is as strong a case as you can put against me ; but in that case I think that if the illustrations which I refer to were well chosen, the Judge would put it to them that in order to reduce murder to manslaughter there must be some sudden definite wrongful act on the part of the wife as much calculated to deprive the husband of self-control as blows or violence, or the sight of adultery. If the provocation were less than that, I think that the Judge would say, "This is not the kind of case "which the law contemplated when it gave you that power."

2165. Then you still contemplate the Judge giving them a direction ?—Yes. I do not think that he should give them an absolute direction, but an explanatory direction.

2166. In that respect you would change the Indian law ? Yes.

2167. And you would not let it be simply a question of fact for the jury ?—Certainly not ; I think the Indian code goes too far in doing so. I would attempt to meet the difficulty as far as I could by giving pointed illustrations of the sort of provocation which the Legislature had in its mind ; and an additional reason why I would do that is, that the Legislature has no positive and distinct rule in its mind at all ; it means things like provocation by the sight of adultery, or like provocation produced by blows.

2168. At your leisure will you favour us with a short draft of what you consider should be the modification of this provocation clause ?—I will do it in the best manner I can. I am sensible of the extreme difficulty of the matter ; but I would wish rather earnestly to observe that, although there are difficulties in the course which I propose,

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there are very strong objections to the continuance of the existing state of things, because it does produce occasional deflections from the law *in favorem vitæ*, as took place in Hall's case, and it produces also occasional breaches of the law by the jury, which in my opinion are positively calamitous.

2169. (*Mr. Hardy.*) Supposing that you were not in any way to illustrate provocation, would not the Judges be almost obliged to define it in summing up, as something which they know and interpret according to the law as it now stands?—I do not quite catch your point.

2170. Words, for instance, they consider as not a justifiable provocation: would they not be obliged to interpret, as they interpret now, what was the proper sort of provocation, unless you gave some illustration as you propose?—Yes, if you left it without illustration. If you said only "deprived of the power of self-control by grave and sudden "provocation," I do not think that the law would be changed, but the change which the Indian Commissioners introduced lies in the three lines of explanation which leave it to the jury. That is the essence of the change, and that is where I think that they go too far; I would substitute for that, illustrations.

2171. (*Mr. Waddington.*) Would you bring the law much nearer the French law, in which no murder is capital unless there is premeditation; under some specification or other, murder there in general, as you are aware, is not capital?—It is a very invidious thing to criticise the law of another country, but of all the definitions of murder which I have seen, the one of the French law appears to me to be the least satisfactory; it appears to me to proceed altogether upon a wrong basis, and I should be exceedingly sorry to see our law in any degree assimilated to it.

2172. (*Mr. Neate.*) Would what you propose be a very substantial change with reference to dealing with cases of this sort. At present, does not the Judge refer to established cases as illustrating what the jury ought to do?—"Provocation" is defined so very strictly by the law as it now stands, that there is no latitude left to a Judge at all. Speaking under correction, I suppose that the law of England is, that there are two provocations, and two only, which will reduce murder to manslaughter; namely, first, a personal assault of considerable violence, not a mere slight assault, but a serious assault; and, secondly, the sight, or, at any rate, very recent knowledge, of adultery actually committed by a wife with some other man. There is another case, a case where it was held by one Judge, whatever it may be worth, that where a man had seen an unnatural crime committed on his son, it would reduce the offence to manslaughter; but these are the only cases that I know of in which the provocation is sufficient to reduce the crime to manslaughter.

2173. (*Mr. Waddington.*) I think that it is held that where the death is occasioned by a deadly weapon, the presumption against manslaughter is much stronger than where it is occasioned by a blow which is almost certain not to produce it?—Of course the mode of killing is one of the most important circumstances which the jury have to take into their consideration; but it is only one item of evidence.

2174. The provocation might tend to justify a blow with the fist, or with a slight stick, and in that case it might reduce the offence to manslaughter which would not be reduced to manslaughter if the killing were with a pistol?—No doubt. In Foster's Discourse upon Homicide he deals with cases of that sort, and no doubt the law would be administered in that manner.

2175. (*Mr. Neate.*) With reference to the second damnatory defini-

tion, "where the injury is likely to cause death," would you make any distinction as to the nature of the offence in the perpetration of which the death takes place, or would you apply it in the same manner to the case of a man who kills another in an attempt to rob him, where the injury is likely to cause death, and to the case where a poacher assaults a keeper. The law, as I understand it now, makes a distinction as to the nature of the offence, where it is done in the commission of a felony ?—I do not entirely agree with that view of the law. I apprehend the law to be this, that if a man is in the commission of a felony, and causes death, however he does it, whether what he does is likely to cause death or not, that is now murder. If a man is not in the commission of a felony, and his act causes death, under the present law it is murder if to his knowledge it was likely to cause death, and not otherwise. Under the Indian code, I take it that the question of felony would be immaterial.

2176. And you agree with that view ?—Yes ; I think that if a man commits a burglary or any other felony he ought to be punished for that, and that if in the course of it he accidentally kills a person, he ought to be punished for the burglary, but not for the murder.

2177. (*Mr. Waddington.*) I suppose that under the Indian code it would make no difference in the man's punishment whether he killed the person or not ?—No ; except that it would be in the discretion of the Judge.

2178. But, so far as the law was concerned, it would make no difference ?—Just so.

2179. Do you consider it a correct state of things that a man who commits a burglary without any violence at all should be liable to be punished as much as a man who commits a burglary and kills one of the inmates of the house ?—I must be allowed to answer that question with a little explanation. If a man commits a burglary without any violence he is liable to penal servitude for life. For instance, a boy who breaks a pane of glass to steal a penny tart from a confectioner's shop at five minutes past nine of a summer evening is liable to penal servitude for life. A man armed with a cocked pistol committing a burglary in a lonely farm house in the dead of night and threatening the owner with death, is also liable to penal servitude for life. The pistol accidentally goes off, and shoots his companion who went in with him. This is murder, and it seems to me very hard that it should be so.

2180. That is not the question which I put to you. I put to you the case where he kills one of the inmates of the house, not accidentally, but in robbing him, but does not use a degree of violence which would be likely to cause death ?—It entirely depends upon the means which he uses. I should probably say that if a burglar pushed a man down stairs he would know that there was a great chance of his dying.

2181. Suppose the case of an invalid old lady upon whom he throws a cushion, and she dies of the fright ?— I should be very reluctant to treat it as murder, which it would be by the present law.

2182. I am supposing some violence connected with the burglary, but of so slight a nature that it would not be murder in the Indian law ?—Supposing he woke her up roughly, taking hold of her with the hand, whereby she got a nervous shock and died immediately, I think that it would be very hard to treat that as murder ; and I think, considering the extreme gravity of the punishment which the man would be likely to receive for the burglary, it would meet the justice of the case.

2183. (*Mr. Hardy.*) The case which Mr. Waddington alludes to is the case of a man having a particularly thin skull, and being hit with a

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moderate stick and being killed, you would not consider that murder?—No. There was a case tried at Warwick long before I had anything to do with the circuit, in which three lads at Birmingham went out to pick pockets. There was an old gentleman with a watch, and one of them snatched the watch from his pocket and another struck him, in order to make him stoop forward so as to open his pocket. The old man died from the blow, and the three lads were convicted of murder and sentenced to death. I think that was very hard.

2184. (*Mr. Waddington.*) I remember a burglary in Lincolnshire where an invalid old woman was alone in the house. The burglars did not offer any serious violence to her, but she attempted to scream, and they threw some pillows upon her and carried off the property, and she was found suffocated. They were tried before Mr. Baron Gurney at Lincoln, and convicted and hanged for murder?—I think that if they had been transported for life for the burglary it would have been a more satisfactory sentence.

2185. I do not think that the public objected to it?—In those days probably the burglary was a capital crime.

2186. It was, but no man was hanged for it if it was committed without violence?—I was talking merely of the definition of murder. Those are the points with respect to the definition of murder which I have thought of.

2187. (*Mr. Hardy.*) Is there anything in the Indian code with respect to infanticide?—I am not aware. I am ashamed to say that I have not looked. The circumstances of England and India in respect of infanticide differ so much, that probably the same law would hardly be suitable for the two countries.

2188. (*Lord Advocate.*) There is a clear distinction between the classes of these exceptions where culpable homicide is not to be murder. One is where from the circumstances there is no murderous intent?—Yes.

2189. Another is where there being a murderous intent it is justified or excused by provocation?—Yes. When you say "murderous intent" you must mean one of the four intents specified in the early part of the definition. All acts done with any of these intents are murders. The definition then goes on to show how provocation acts, and then it provides that provocation shall not have its normal operation in particular circumstances.

2190. Is there not that particular exception, that although the facts would otherwise imply murder, yet the want of the intention would make it culpable homicide?—Yes.

2191. In the case of provocation where the intention exists, you presume that the man intends to kill his victim?—Yes, or to do him harm likely to kill him.

2192. (*Chairman.*) Do you now propose to go into the question of infanticide?—Yes; I have heard many trials for child murder, and I believe that it is the almost universal experience upon that matter that it is exceedingly hard to get a jury to convict of child murder, and that if a conviction takes place it is very rare to have an execution, if indeed there has been one for many years past.

2193. (*Mr. Waddington.*) The last was in 1849?—I think that there are several reasons which explain that state of feeling, and that the law ought to be accommodated to it. In the first place, the operation of the criminal law presupposes in the mind of the person who is acted upon a normal state of strength, reflective power, and so on, but a woman just after childbirth is so upset, and is in such an hysterical state altogether, that it seems to me that you cannot deal with her in the

same manner as if she was in a regular and proper state of health. I believe also (though that is more a medical than a legal question) that women in that condition do get the strongest symptoms of what amounts almost to temporary madness, and that they often hardly know what they are about, and will do things which they have no settled or deliberate intention whatever of doing. That is one circumstance. Another circumstance is that the crime itself is less serious than other kinds of murder. You cannot estimate the loss to the child itself, you know nothing about it at all. With regard to the public it causes no alarm, because it is a crime which can be committed only by mothers upon their newly born children. Besides that, there is the strong sympathy, which it is never safe to neglect and which always will exist, with the miserable condition of the woman; and there is a sort of feeling (I do not say that it is very reasonable, and I do not know exactly how to connect it with the fact) as a general rule against the father of the child, who goes unpunished, which makes its way with juries and with the public It seems to me that that being so, and as you have to legislate for human nature as you find it, it would be a very desirable thing to pass a special statute (of course I am not prepared to suggest its terms, but I do not think that it would be very difficult to frame it) enacting that any woman who killed her new-born child with intent to conceal the birth should be liable to the severest secondary punishment in the discretion of the Judge. I think that in that case the real punishment would be heavier, and that the effect would be that the jury would not be tempted to violate their consciences, which they often do now. Besides that, it would sweep away several irrational distinctions which have grown up in the law; for instance, there is that curious distinction about the child being born alive, which is now almost always acted upon, and which is only an invention for the purpose of eluding justice, as all quibbles do. I think that it would be very easy by some such Act of Parliament as I have mentioned to make it a separate offence.

2194. (*Mr. Justice O'Hagan.*) Your observations are confined to the time of birth, or immediately afterwards?—Yes; after that exceptional state of things has passed away I do not think that you could recognize any distinction. I do not know that I should wish to limit the time very nicely, because the effect of childbirth upon a woman's nerves lasts for a considerable time in some cases. I would rather have a little indefiniteness in the law than run the risk of an encounter between the law and the public sentiment.

2195. (*Mr. Waddington.*) You, I suppose, would not confine it to illegitimate children?—No.

2196. (*Mr. Hunt.*) Would you make it a substantive offence?—Yes, and then the indictment would always be for that substantive offence, with power to the jury to acquit of the killing and to find a verdict of guilty of concealing the birth if they thought proper.

2197. What would be the punishment which you would propose?—It is a great characteristic of the law of this country, and, I think, an extremely wise and happy one, that the Judges have the greatest latitude in punishment, and it seems to me that one of the most important of a Judge's duties is the apportionment of punishment in particular cases. I would not depart from that. I would say penal servitude for life, or for such shorter time as the Judge thought fit, with the usual alternative power of imprisonment.

2198. In the case of any other person than the mother murdering a new-born child, would you leave the law as it is?—Yes. I do not see

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that any one except the mother has any excuse for murdering a new-born child, more than a grown-up man.

2199. (*Mr. Hardy.*) There have been a great many cases of verdicts by coroners' juries for infanticide?—I do not attach much importance to the finding of coroners' juries. I have very often met with cases in which women have been committed for wilful murder where there was no proof that the child was born alive, and where I thought that the child was really born dead; and there are constant cases of accident, of the woman going to a privy and the child being born. I do not think much of figures of that kind.

2200. (*Mr. Justice O'Hagan.*) You would not say that if the infanticide occurred three weeks or a month after the birth of the child, it should be too long a time?—No; I am inclined to think (but I give the opinion with some degree of misgiving about it), that an attempt to conceal the birth ought to be an element of the special offence of which I am now speaking; and of course, an attempt to conceal the birth could not exist, except in the case of what is, in ordinary language, a new-born child; it could not exist when everybody knew that the child was born.

2201. (*Mr. Hardy.*) You say, with intent to conceal the birth, and not with intent to conceal the body, which makes a very great difference; the concealment of the body may not take place at all?—There is a difficulty about it; and I make that remark, as I have said, without confidence in its being right.

2202. Supposing that you took the limitation during the time that the child had not been seen by any other person?—Then you would come to the case of somebody who had just gone into the room for a moment and seen it. I would put as little limitation into the law as possible, because practically a limitation almost always operates harshly, sooner or later. As I have already said, I am in favour of the retention of Capital Punishment; but it does not seem to me that it is a very great loss if a certain number of people, the hanging of whom might be justified, do go unhanged.

2203. (*Mr. Justice O'Hagan.*) But it requires to be precise in your definition of infanticide?—I should say a new-born child. Then as to what is a new-born child, I would let the Judges reduce that to such a degree of definiteness as circumstances might show to be necessary.

2204. (*Mr. Hardy.*) You also would include, I presume, inflicting a deadly injury during the birth, whether the child was severed or not?—Yes; or before the birth. I should word the Act in such a way as to do away with all those refinements, as to whether the child was born or not born.

2205. (*Chairman.*) Do you wish to make any observations upon the subject of suicide?—With respect to suicide, by the law as it now stands suicide is murder, and a person who aids and abets another in committing suicide is a murderer: that I confess seems to me to be extremely harsh. If you test the gravity of the crime by the tests which are laid down by the best writers upon that matter it seems absurd to treat it as a crime. As regards the person who kills himself, the consequences cannot be measured, and certainly the person who abets him does not hurt him, he only helps him; and, as regards the public, it is a case in which no alarm could be produced, because nobody could be afraid that he should kill himself, and that somebody else would help him. The only harm, therefore, which you have to provide for is the immorality of it, the low estimate of human life which it shows; but that is a very different thing from taking away another person's life when he is under the protection of the law. I

think that it should be declared that suicide is no crime, but that to assist another person to commit suicide is a crime, and I would punish such assistance with penal servitude or imprisonment and hard labour, at the discretion of the Judge. The conclusive argument against treating such a crime as murder is that if you suppose a person convicted of murder for such an offence, it is inconceivable that he should be executed.

2206. (*Mr. Waddington.*) You are aware that there was a man convicted of that offence about a year ago ?—At Chester ?

2207. No ; at Maidstone or Guildford. He was a soldier, and, upon the recommendation of the Judge, his sentence was commuted to transportation for life ?—There was a very curious case of two persons killing themselves together, either at Chester or at Liverpool, or in that part of the country.

2208. (*Mr. Hunt.*) That offence is more common, is it not, in France than in this country ?—That may be so. An alteration such as I propose would incidentally produce one or two other changes which I think would be very advantageous. If suicide was no longer a felony, coroners' juries would no longer go on perjuring themselves by talking of a man being in a state of insanity, which is really a falsehood ; and in the second place questions of forfeiture would be done away with, which sometimes work a great deal of injustice. I believe that it is not usual (I do not know how that is, of course,) for the Crown to insist upon a forfeiture for felony. But considering how much forfeitures are in the hands, in many places, of corporations and private persons, one can imagine a most cruel injustice being done by such a forfeiture.

2209. (*Mr. Justice O'Hagan.*) I have known a case in Ireland within the last six months where the Crown administered the property to the family, that is in the discretion of the Crown ?—Certainly ; but it appears to me that the thing would be sensible only if the Crown took it for itself. That is like the point, that a man would not be executed for the offence. If the Crown never takes it, it ought not to have the right to take it.

2210. (*Chairman*). I do not think that we have had distinctly from you whether, in the course of your experience of seven years, and having been engaged in I think you say 19 capital cases, besides having paid great attention to a vast number of other cases of a similar character, the result of your experience is that the juries are willing or unwilling to convict for murder, from the dread that the capital sentence may be the result of their verdict ?—I think that except in those cases which fall under the qualifications on which I have been remarking, they are not unwilling to convict in a case where they think that an execution will probably follow ; that is, in what I call real murders.

2211. If the evidence has sufficiently clearly made out to them that the prisoner is guilty of murder, they are not unwilling to find him guilty, according to the terms of their oath ?—Not as far as my experience has gone or my observation, though I should say that I believe there are local exceptions, for instance, in the town of Maidstone ; but, as a rule, I should say not. Now and then there may be a particular man who may insist against a capital conviction, and so on ; but, as a rule, I should say certainly not, and that they would generally execute the law. But I will add one observation upon that subject, which I think is important, namely, that it must always be remembered that from the nature of the case, apart from the punishment, the evidence in the case of murder is generally more unsatisfactory than in other cases. In almost every other crime, theft and robbery and rape in particular, and all the ordinary run of crimes, you have, as

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a rule, the injured person as the principal witness; but in murder, the murdered man cannot give evidence; and also, in the case of murder, it is generally done with every precaution for secrecy, and therefore the evidence is less satisfactory, and that will account for a larger proportion of acquittals than there would otherwise be. Besides that, I should suppose that the number of murders which are prosecuted, in proportion to the number of murders which are committed, is considerably greater than the number of robberies or thefts prosecuted in proportion to those committed; that again would give a reason why the proportion of acquittals might be greater.

2212. (*Mr. Justice O'Hagan.*) Is it the result of your experience that juries are not more unwilling to assume the responsibility in a capital case than in any other case?—I think that they always weigh the evidence more carefully in proportion to the gravity of the offence in all cases, and not merely in capital cases; and I add that they ought to do so. I would also add that I do not think that their standard of proof is at all too high, and that I should be extremely sorry to see that standard of proof lowered. I think that it would be a great evil if people were convicted of murder upon slighter evidence than juries now require.

2213. (*Mr. Hunt.*) You mean if the punishment was something less than death?—Be the punishment what it might. If the punishment was merely loss of character, I should be sorry to see a man stigmatized as a murderer upon a lower standard of evidence than juries now require to take his life. It appears to me that, considering the consequences of all kinds, it is of the very greatest importance that you should exact the highest possible standard of proof; and it is my experience (I do not know what may be the experience of others) that it is very necessary to impress upon the jury the importance of attending to the evidence, and not giving way to those feelings of indignation which anything like cruelty always excites.

2214. (*Chairman.*) Would it not necessarily follow, that if it is difficult in cases of murder to produce the evidence of murder, it would therefore be necessary that that evidence, when produced, should be more accurately and minutely gone into than if the evidence was clearer?—No doubt. From the great difficulty which attends the proof of a murder, from the nature of the case, I think that it is of the highest importance that every means should be used to make juries weigh the evidence which is given with the most scrupulous attention.

2215. (*Lord Stanley.*) Am I to understand you to put it in this way, that you think that a higher degree of evidence is required in the case of murder, because it is a graver offence, than would be necessary to convict a man upon a minor charge, such as manslaughter or burglary?—I do not confine it to murder, but I think that in proportion to the gravity of the offence, juries are careful in weighing the evidence, and I think that they ought to be so.

2216. (*Mr. Hunt.*) Is there a greater desire in the case of murder on the part of the public to bring the offender to justice than in the case of other crimes?—I think so.

2217. And do you think that for that reason juries would be inclined to convict people of murder with a less degree of evidence than now satisfies them?—It may be so. People get possessed with a strong notion of somebody being the author of a deadful crime, so that it would be a very serious thing to diminish by any means the standard which is at present insisted on. To take a very familiar instance: I do not think that in Müller's case anybody would have hesitated for a single instant in convicting him, if it had not been for the

question of the execution, and that without duly weighing the evidence. The feeling was so strong that if the consequences to Müller had not been awful the jury would have convicted him on very little evidence; and I think that it was of the highest importance to public justice that that case should be most scrupulously weighed, investigated, as it was, to the very bottom, and in so far as the existence of the punishment of death went to secure that examination for it, I think that it was very beneficial to the public, and I think that it was not only beneficial to the public, but that if Müller had been an innocent man it would have been beneficial to him, and would have secured his acquittal.

2218. (*Mr. Justice O'Hagan.*) You say that in proportion to the gravity of the punishment, juries are in general more careful?—Yes.

2219. As between penal servitude and ordinary imprisonment, or as between a long term of penal servitude and a short term, do you not think that there is a very great difference in the way in which the jury estimate the gravity of the offence, as compared with Capital Punishment?—I should like, if I may be allowed, to answer that question, not quite in the terms in which it is put, but a little at large. It includes an observation which I ought to have made when I was last examined here. I think that the leading principle in all matters of punishment is, that you ought to have the moral feeling of the public on your side. I think also that the public roughly and indefinitely, but still really, do assess some degree of punishment to certain offences. There is a vague popular sentiment, which you cannot exactly reduce to terms, but still they do assess the punishment, to some extent. As long as the law keeps within those limits, I think that, as a general rule, the jury will do their duty. Directly you get beyond those bounds the jury will not do their duty; and the great test whether you are within or without the limit is whether the jury will return a verdict according to law or will not. It was no doubt difficult in former times to convict a man of stealing 40*s.* in a dwelling house, because the juries objected to Capital Punishment for such offences. With regard to murder, I have already said that I think that the public sentiment, as collected from juries, does not object at present to the infliction of Capital Punishment in what I have called a case of real murder. I think that when the matter is fully and fairly examined there is no evidence to show that there is such a feeling in the public mind. With respect to what are technically called murders, I think that there is evidence that they do object to it, and I would model the law so as to meet that. Then to come to the question which you have asked me, I think that if a jury thought that a prisoner was going to be severely punished for a crime that did not deserve severe punishment; if they thought, for instance, that the Judge would give a sentence of penal servitude for life, or anything of that sort, in any particular case, they would be very reluctant to give him the chance of doing it. I will mention one illustration of that, which is rather curious. It is a piece of Quarter Sessions experience, which lies, perhaps, out of the way of a good many of the members of the Commission, except such members of the Commission as happen to sit upon Quarter Sessions; but I think that every one who knows about Quarter Sessions practice knows that when you indict a man for an assault upon a police constable in the execution of his duty, with a count for a common assault, it is a most difficult thing to get the more serious conviction, but that you always get a conviction for the common assault. So in the case of indictments for wounding with intent to do grievous bodily harm, the result is almost always a conviction for unlawful wounding. I have not

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paid the attention to these cases which I have to cases of murder, but if I had done so I am sure that I could have given you detailed evidence to show that convictions on the minor charges bear as large a proportion to indictments for the more serious offences as convictions for manslaughter to indictments for murder. Juries adopt that course because they think that it is wrong to assault the police, but that the police must not do quite as they please, and because they often see reason to doubt whether a man really meant to do much harm by a cut or a stab.

2220. (*Mr. Waddington.*) Are not recommendations to mercy much more frequent in capital cases than in cases punishable with penal servitude?—Recommendations to mercy are so capricious that I should be very sorry to give an opinion upon them at all. I have known cases in which a recommendation to mercy might be expected and has not been given.

2221. But you have frequently known them in capital cases, have you not?—I have not paid very much attention to that point. In the 19 cases which I have described I do not remember a single case where a man was recommended to mercy who was hanged, and in all the cases which I should call real murders in which the men were convicted they were hanged.

2222. (*Mr. Hardy.*) I understand you to say that if the result of the abolition of Capital Punishment was to ensure, as it is said, greater certainty of conviction by the jury convicting upon a less amount of evidence, that in itself would be an evil?—I should consider it a great evil, for this reason, amongst others, that I feel that even as the law now stands the number of incorrect convictions is greater than is supposed. Three instances came under my own observation in one year, in cases in which I was engaged, where people were pardoned subsequently to conviction on the ground of innocence.

2223. (*Mr. Justice O'Hagan.*) They were non-capital cases?—Yes; one was a case of rape, where a man was convicted by manifest perjury.

2224. (*Mr. Waddington.*) Perhaps you are aware that these are common cases?—Yes.

2225. The jury are carried away by the evidence of the woman?—Yes. Another was a case of obtaining money by false pretences, in which the man was a colliery clerk. His story was that he had entered the names of real people in his books, and that they had gone away, but he could not prove that at the trial, and he was convicted, and there was clear evidence to convict him.

2226. (*Chairman.*) Why did he not produce that evidence?—He said that the people were wandering colliers, and that he did not know where they were, and some time afterwards he or some of his friends got them together and did produce them, and his sentence was remitted. I have known three cases, non-capital, in my own experience in one year, in which the sentence was remitted (the third was a case of night poaching), and for that reason I incline to think that the standard upon which juries convict is not too high.

2227. (*Mr. Waddington.*) There was ample evidence in all those three cases to justify the verdict?—Yes, there was perfect evidence to justify the verdict.

2228. Therefore there is not the least imputation upon the jury?—Certainly not; but I use it to show how extremely cautious people ought to be, and what a great advantage there is in the intense eagerness with which the evidence in a capital case is investigated.

2229. (*Lord Advocate.*) In fact, that any relaxation of it would be a public evil?—Yes.

2230. (*Mr. Neate.*) When do you conceive that our present definition of "wilful murder with malice aforethought" was first established as a rule of law?—I think that it grew up by degrees, but my impression is that it began to be established when the statute was passed in the time of Henry VIII.

2231. The 23rd of Henry VIII. ?—Yes.

2232. Have you ever in your researches found in any authentic record that definition laid down as the definition of murder ?—No, not till the time of Lord Coke.. I have looked through all the text books, Bracton, Fleta, and Lambard, (whose account of the matter is very curious,) and so on. It begins with a strange description, taken from Roman law, of Bracton's, and you get it repeated and hashed up by various writers down to Lord Coke. That definition is very like the definition which is given, I think, in the 3rd Institute.

2233. Do you conceive it to be a statutable definition, or a common law definition ?—I conceive it to have been invented by the Judges ; that is to say, it was a common law definition.

2234. Then you consider that the Statute of Henry VIII. merely recognized the previous common law definition ?—I suppose so. My impression about the Statute of Henry VIII. is that it recognized the current language of the Courts at that time.

2235. And that it merely adopted the common law definition ?—Yes.

2236. (*Mr. Waddington.*) Are you aware of the Statute of Richard II. in which murder with malice prepense is distinguished from other homicides, the statute with reference to the Royal pardon, which in cases of malice prepense draws a distinction ?—I am afraid that I have overlooked it.

2237. (*Mr. Neate.*) The Judges, shortly after the Statute of Henry VIII., did not put the same construction upon it as they have put in later times, did they ?—As far as I know, the authorities, till Crown cases came to be reported, were so very scanty, that it would be difficult to say what they did.

2238. I observe that in your book you state, upon the Stabbing Act of James I., that it is quite clear that the Judges at that time did not understand that wilful murder with malice aforethought would include many cases which, as the law now stands, would fall under that head ?—I am quite of that opinion. It is a conjecture, more or less ; but my inference from the Act of James I. is, that the definition, or, as we may call it, the practice of the Courts, then attached what I would call the natural sense to the words "malice aforethought," and not the artificial sense which is at present attached to it.

2239. Then our law of murder has grown up by degrees ?—Certainly.

2240. By an expansive interpretation of those words ?—Yes. The distinction between murder and manslaughter was unimportant in those days, and was more a classification than a distinction, because originally both crimes were capital, and both were clergyable.

2241. (*Mr. Waddington.*) After the Statute of Henry VIII. which took away clergy, it became very material to the persons who had the benefit of clergy ?—Yes ; but when the benefit of clergy was understood in its natural sense, the distinction was of very little importance.

2242. (*Mr. Neate.*) Do you agree that the way in which the law of murder has grown up affords a just reason for a more authoritative definition of murder ?—My own opinion, as expressed in my book, where my reason is given for it, is, that every part of the criminal law, and, I may add, every part of the law of England, most undoubtedly

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requires authoritative definitions. Quite apart from the question of Capital Punishment, I should think it a great improvement.

2243. You do not consider our present criminal law wanting in authority in the way in which it has grown up?—No; the great guarantee for the law in this country is, and for a great length of time has been, the character of the Judges; I think it is as well administered as it can possibly be, and it is surprisingly reasonable, considering that many excuses might be found for administering it in an unreasonable manner.

2244. You do not consider that it would be open to any man to argue, with any chance of effect, that the interpretation put upon the law now by any Judge is quite different from that put upon it by his predecessors?—No; I do not think that any Judge would listen to it for a moment.

2245. How do you account for Sir Edward Coke leaving out "aforethought" in his definition?—I do not think that he was very accurate.

2246. You would not lay much stress upon his definition?—No. If you look at Foster's criticism, and at a great deal of what he says upon the law of murder, it is quite clear that Sir Edward Coke was not an accurate man, whatever else he was.

2247. (*Mr. Waddington.*) The whole of the 3rd Institute is very loose?—Yes, very loose indeed, I think.

2248. (*Chairman.*) Have you anything to add to the evidence which you have given?—No; I am not aware that I have anything to add upon any special part of the matter, and I have no wish to say anything more upon the general part of the matter, unless I am asked.

2249. (*Mr. Waddington.*) If these changes took place in the law, and Capital Punishment was retained for what you call real murders, would you in the other class of murders give the Judges a discretion (of which I understand you approve) as to awarding penal servitude for life, or any lesser sentence?—I would give them the same discretion as they now have with respect to the punishment of manslaughter. I would add that I consider it a very important thing that the word "murder" should be confined to the offence for which you mean to inflict the highest punishment, be it what it may, and that the word "manslaughter" should be employed for all other cases, and that the words "murder in the first degree," and "murder in the second degree," and manslaughter in the first and second degree, should be avoided.

2250. Take the class of cases which are now murders, and which under this change in the law would fall under the term "manslaughter," would you give any increased latitude to the Judge, or would you leave the law as it is at present?—I would leave it as it is. I think that manslaughter by negligence might be distinguished from manslaughter under provocation; but I think that that is a matter of no great importance so long as the Judges have their present discretion as to punishment.

2251. In a case of what is now constructive murder, punishable with death, you would let the Judge pass a sentence of a day's imprisonment if he thought proper?—Yes; he has that discretion already as to manslaughter, burglary, forgery, arson, felony after previous convictions, and various other crimes. Experience seems to show that it is very beneficial.

The witness withdrew.

The Rev. JOHN JESSOP, M.A., examined.

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2252. (*Chairman.*) You are chaplain of Horsemonger Lane gaol?—I am; and also a visiting justice of the county gaol of Hertford.

2253. Are you a magistrate for Hertford?—Yes.

2254. How long have you been chaplain of Horsemonger Lane gaol?—Nearly 10 years.

2255. During that time have you given much attention to the question of Capital Punishment?—I have given it very careful attention, not only professionally, but also generally.

2256. What conclusion have you come to as to the wisdom of retaining it or of abolishing it as a punishment?—I am of opinion that religiously, politically, and socially it is quite indefensible.

2257. When you say that religiously it is indefensible, do you mean that it is contrary to the tenets of the Bible?—Exactly so.

2258. Leaving the religious part of the question, you think that politically it is inexpedient?—I mean to say that, looking at it in a political point of view, the aim and object of Government is clearly to elevate and educate the most ignorant and depraved classes. Now I believe that it is proved that the most ignorant and the most depraved are those who attend these public executions, and I think that the sight demoralizes and brutalizes them, and therefore rather counteracts the object of good government, and consequently that politically it is an unmixed evil.

2259. Does that observation apply to a public execution, or to any execution at all?—This applies to a public execution; of course it would not apply to a private execution; it applies to a public execution, where a number of persons are gathered together as they would be at a prize-fight, or a bull-fight, or any brutal exhibition; the same class I believe attend those exhibitions.

2260. (*Lord Stanley.*) So far as that objection is concerned, would it not be entirely done away by having executions, as in some States of America, within the walls of the gaol?—Most decidedly.

2261. (*Chairman.*) Then am I to understand you to confine your objection to public executions?—Not only to that portion of the subject.

2262. But you still object to Capital Punishment politically?—Exactly.

2263. In what way?—I think that it tends to familiarize persons with the taking away of life, that it lowers their estimation of the sanctity of life, and that it has not the deterrent effect which it is supposed to have; I think that it is demoralizing.

2264. How do you base that opinion, that the deterring effect of Capital Punishment is not so great as is imagined?—Because I do not think that when persons commit murder they take the element of detection into account; they are usually of a higher class than the ordinary thieves and the persons who frequent sights; they are persons of a higher degree of education, and they usually plan their murders, and they plan them as I believe with the hope and expectation that they will not be detected; and when they commit a murder, or plan it, they do not imagine that they shall be found out.

2265. Do you think that if, when they planned the murder, they expected to be found out, it would have any effect?—In many cases of murder, such as murder for sordid purposes, or murder by poison, where property is involved in the result, if they imagined that they would be found out, I believe that they would not commit them.

2266. Do you think that the question of Capital Punishment would have any effect upon them?—No, I think not, because I do not think

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that they take into consideration at all the being found out. I think that they ignore the idea that they will be found out.

2267. Do you believe that if they thought that they would be found out, and that the result of such finding out would be that they would be inevitably hanged, it would prevent their committing the offence?—If they were certain that they would be found out and would be hanged, I imagine that they would not commit the offence, unless they were maniacs.

2268. (*Mr. Waddington.*) In some cases murders are committed for the purpose of enjoying the fruits of the murder?—Yes.

2269. And therefore penal servitude would deter those persons as much as hanging?—Yes; they would not commit the murder at all under any circumstances if convinced they would not enjoy the fruits.

2270. (*Lord Stanley.*) With regard to another class of murders, namely, those committed under provocation or from feelings of hatred by persons of a low and brutal class, do you believe that any punishment produces so much fear in the minds of such persons as that of death?—I believe that perpetual imprisonment would produce quite as much effect, but I do not think that they take the punishment into account as they do in an ordinary crime; they act under the impulse of jealousy or hatred, or any other strong impulse.

2271. (*Chairman.*) Do you think that it would be possible in this country to carry out perpetual imprisonment?—You do it already, and have done for years. In the case of criminal lunatics you have for years past confined numbers of persons in Bethlem, not in separation, but in association, and no unhappy result has followed, no warder has been killed, they have not even killed one another, and there they have an actual homicidal tendency. They are now at Broadmoor, and there has been no such instance of a warder or an inmate being killed.

2272. With regard to the punishment which you would substitute for Capital Punishment, namely, perpetual imprisonment, would you substitute such imprisonment as criminal lunatics are now subjected to?—I should divide murders into two classes, the first and second degree; for instance, all murders committed with malice aforethought and premeditation, murders by poison, and murders where there is an evident interested and sordid motive, murders with rape, and, perhaps, one or two more, should be in the first category, and all other murders of a different class should be in the second, and I should suggest that those who committed murder in the first degree should be subjected to a similar control to that to which prisoners at Broadmoor are now subjected, and have been for years, having no hope of release, nor the slightest prospect of any mitigation of their sentence. They are morally and politically dead.

2273. (*Lord Stanley.*) Are not the prisoners at Broadmoor treated as prisoners not responsible at the time for the act which they committed, and therefore not so much criminals as patients?—To a great extent, no doubt. I cannot speak from knowledge, not having seen Broadmoor.

2274. Therefore does the precedent of a place like Broadmoor apply, as to the possibility of perpetual imprisonment, to a case where prisoners would be confined for the purpose of being subjected to penal discipline?—I think that it would apply quite as well, because the imprisonment at Broadmoor or Bethlem began with a homicidal tendency; they are inclined to kill, without reference to revenge or any motives of obtaining property or indulgences, whereas with ordinary murderers there is only one person whom they wish to destroy, and

they destroy that individual for the object which they would attain; they would not be likely to attack their warders, or to commit any of those homicidal acts which persons in Broadmoor would do because of their homicidal tendency.

2275. (*Chairman.*) Supposing that a person was confined, as you suggest, in Broadmoor for his life, and that at the expiration of 10 years he died, which would suffer during the 10 years the severest punishment, a man who was so confined in Broadmoor, or a man who had been sentenced to penal servitude for 10 years for a much less offence than that of murder?—The man who had 10 years' imprisonment in an ordinary prison would suffer much more I should think.

2276. Then would you think it a wholesome state of things that a man for a less offence should be punished in a greater degree?—The man might not die in 10 years, he might live for 20 years, or die in a week. I do not think that the punishment is meant as revenge, but that it is meant as a protection to society.

2277. To deter others from committing the like offence?—To protect society from the same man's assaults or injuries.

2278. (*Mr. Hardy.*) I understood you to say that those men would not be likely to commit assaults upon other persons, having gratified their revenge in the one case?—So long as they were confined in the prison they would have no motive to do so, but supposing them to be punished at all, it is with a view to protect society from any subsequent assault.

2279. (*Chairman.*) I understood you to propose in lieu of Capital Punishment that persons who had been guilty of murder should be confined at Broadmoor or some other establishment, whilst others who had been guilty of burglaries and other offences would be under penal servitude?—Yes.

2280. And the question was whether penal servitude would not be the much more severe sentence of the two?—I should subject these persons to the same or even a more severe discipline than the penal servitude prisoners are subjected to.

2281. Does not perpetual imprisonment vary very much whether the prisoners are in association, or whether they are kept totally separate, or whether they are perfectly silent, and according to the labour which they are put to during that time?—There are different degrees of hardship, according to the discipline of the various prisons. In some prisons they are confined in separation during the earlier portion of their sentence, and then they are sent to Government works, where they are in association.

2282. What description of imprisonment would you substitute for Capital Punishment?—I would substitute the most severe form of penal servitude which we have at present, even with some additional severity, if possible. I would keep the prisoners entirely separate, and from ever seeing or hearing from their friends. I would allow no communication with the outer world, and they should be civilly dead, and no longer heard of in society.

2283. Do you think that it would be possible to carry that out?—I think so; and I think so because it has been tried for years past at Bethlem in a manner not so severe as I suggest; but, nevertheless, the principle is the same, they are kept from society. They are now removed to Broadmoor.

2284. (*Mr. Waddington.*) All persons who are insane are kept until they recover their senses, that is what is done at Bethlem and Broadmoor; they are kept as long as they are insane, and no longer?—I rather think that prisoners acquitted on the ground of insanity are

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many of them kept for life. Of course I should not presume to argue the question.

2285. Those who are insane of course must be kept for life. Is not that the case with all lunatics, civil lunatics as well as criminal lunatics? Is not a civil lunatic kept for life, unless he recovers the use of his reason?—But I believe that many lunatics have been in Broadmoor and Bethlem who have committed murder, and who were no more insane than I am at the present moment; they were acquitted on the ground of insanity, but I very much doubt their insanity.

2286. (*Mr. Hunt.*) Are you acquainted with Broadmoor?—No; but I have several times been at Bethlem and seen the criminal lunatics there.

2287. The patients at Bethlem are not under any very severe discipline?—No.

2288. They are treated very much the same as patients in a county lunatic asylum?—Very much the same.

2289. Therefore, except as regards their confinement, they have rather a pleasant existence than otherwise?—Yes; they have their indulgences, bagatelle, and so forth.

2290. They can amuse themselves, they have books to read?—The criminal lunatics are rather different from the others; they are not treated in the same way as the ordinary lunatics in Bethlem are treated; they have a ward of their own, but they have some indulgences.

2291. They have good diet?—Yes.

2292. Better diet than the labouring classes of this country have in their own homes?—Much better.

2293. So that in the case of persons who, as you say, are not really insane, but are wrongly regarded as being insane, and persons having no homicidal tendency, there would be no particular reason why they should murder a warder in order to get free?—None whatever; but I cannot account for maniacs' reasons.

2294. (*Chairman.*) You have told us that the effect of public executions on the populace generally is bad; what effect have they on the prisoners who are confined in the gaol?—I have taken great pains to ascertain that point by inquiry myself, and also asking the warders who have been in charge of prisoners at the time of their execution, and the warders have told me individually and collectively, and in various ways, that it seemed to make no impression on these people, that they heard them say upon several occasions, "Well, so and so is to be "hanged to-morrow, I wish I were outside, I would go in for a good "swag." That is the expression to signify what they would commit in the crowd. They have said, "On the last occasion I got a tremendous lot of purses, I only wish I were outside now." The only impression made upon them seems to be a regret that they are not amongst the crowd to carry on their depredations, and that I believe to be the general impression made upon these people in gaol, that is, speaking of the professional thieves.

2295. They are anxious to be out of prison to go about their everyday calling?—Yes.

2296. (*Mr. Waddington.*) The particular occasion would be a good harvest?—Yes.

2297. (*Chairman.*) Have you any experience of juries, whether they will convict in cases of murder?—I recollect two instances, and rather strong ones, I think. One was the case of a man who was tried at one of the assizes in Surrey, but I cannot mention the name, or the circumstances, because the man is at large at present, and I do not think that I should be justified in stating who the person was. This man upon

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coming into gaol was in a very depressed state, and on talking to him, as I always do to the prisoners, he made a statement to me voluntarily, from which there could be no doubt at all that he intended to make a free confession. He conveyed to my mind the certainty that he was the person who had committed the crime. However, some time went on, and he received professional advice, and so forth, and he was tried at the assizes. Although the evidence was very strong indeed, he was acquitted by the jury.

2298. Was this a capital case?—Yes; a murder was committed and a robbery; and I believe that he was acquitted by the jury solely because they were anxious to take advantage of a loop-hole in consequence of Capital Punishment being the result of conviction. That was the impression on my mind. There was no doubt in my mind that he was the man, because he himself, in almost so many words, told me so.

2299. Did you hear the evidence given at the trial?—I did.

2300. Was it very conclusive?—A great deal of very curious evidence came out in the course of the trial; it was a very complicated case.

2301. (*Mr. Waddington.*) Do you recollect whether Mr. Denman was engaged as counsel?—Yes.

2302. (*Chairman.*) You think that there was not sufficient doubt in the case to warrant the jury in finding a verdict of acquittal?—I think that in an ordinary case of burglary, attended with violence, they would have come to a conclusion of guilty at once, without any doubt at all. I have another case, which occurred at the winter assizes at Hertford, before Mr. Justice Blackburn. There were three men who were indicted for murdering a gamekeeper, and were acquitted; they were then tried upon another indictment for night poaching, and on exactly the same evidence; they were all three convicted and sentenced to various terms of penal servitude. Those are the two cases in which within my knowledge and belief juries have been influenced by a disinclination to find a prisoner guilty in consequence of Capital Punishment ensuing.

2303. And those are the two cases upon which you base the conviction at which you have arrived?—Those are two instances; there are others, not in my own knowledge, but which I have heard and read of. My general belief is that juries are disinclined to convict, and to take the responsibility upon themselves, and these are two instances within my own knowledge in which I think they were biased.

2304. Do you think that the plea of insanity is often caught at by them?—I think that they are very apt to catch at it. I think that they are very willing, if they can, to bring in a verdict of not guilty, upon the ground of insanity. I remember a case which occurred at the assizes in August 1861, in which a woman, named Martha Bradish, was indicted for the murder of her sister, or sister-in-law, in consequence of jealousy of her husband, as she suspected that some criminal connexion had been carried on between them; that woman was in Horsemonger Lane gaol for many weeks, and she showed not the slightest signs of insanity; the surgeon of the gaol was not called to prove her insanity, because he did not believe it, and there were no proofs of insanity, or the proofs of it were very slight, for the defence did not urge it very strongly. Nevertheless she was acquitted on the ground of insanity, and was sent to a lunatic asylum. I made inquiries afterwards, and she never showed any signs of insanity. She was subsequently at Fisherton House, and I believe her to be as sane as I am at this moment.

2305. Did the prosecution make out a strong case against her?—

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They rather kept back the motive of jealousy ; they were willing that the plea of insanity should be pleaded.

2306. Would not that show that the prosecution saw that the defence thought that there was some ground in the plea of insanity ?—They might have taken that view, but I think that it was done to screen the woman.

2307. Would not that rather disprove your idea that the jury on that occasion were to blame in finding that verdict ?—Of course it might be taken in that light.

2308. You have given us what you consider to be a substitute for Capital Punishment. Do you consider that it is practicable to maintain discipline in a gaol which is exclusively devoted to prisoners confined for life?—I think that it is perfectly practicable, with ordinary precautions, and by a judicious management on the part of those in authority.

2309. Do you think that it would be possible to keep prisoners confined for life, without any hope of being set at large ?—I do think so, because the class of prisoners who would be confined are not of the lowest and most desperate class of prisoners generally ; that is to say those who commit murders are not usually those who have been involved in previous crime ; they are usually of a higher order of intellect, and more reasoning beings.

2310. Out of those who are executed annually for murder, do not some belong to what is called the criminal class ?—Some no doubt do, but I think that their number is very small in comparison with the whole number.

2311. Therefore there would be annually persons confined for life, some no doubt who had never been punished before, or caught before, and some (the smaller number) who belonged to the criminal class ?—The much smaller number would belong to the criminal class.

2312. And you think that influences would not be employed to endeavour, after a certain number of years, to get some respite of sentence, supposing that these persons behaved well and gave signs of repentance ?—If it were given out that there were any hopes of mitigation through good conduct, or through the lapse of years, no doubt efforts would be made ; but if it were thoroughly understood that no efforts would be successful, I do not think that they would be made.

2313. But do you think that that could be thoroughly understood ?—I think that it might be thoroughly understood.

2314. And you think that it might be carried out ?—I think so.

2315. Have you been at Newgate ?—No.

2316. Your experience during the time that you have been at Horsemonger Lane gaol has given you opportunities of forming an opinion upon this point ?—The number of prisoners who come under my observation is very much larger than the number at Newgate. From the Judicial Statistics up to September 1863, it appears there were committed to Horsemonger Lane gaol 3,798 prisoners, and to Newgate 1,770, showing that there were 2,028 more prisoners committed to Horsemonger Lane in the year than there were to Newgate. Therefore, as I see all these prisoners upon their admission and discharge, I must have great opportunities of knowing their feelings, as far as one can gather them from this class of persons, and great opportunities, I imagine, of forming an opinion.

2317. (*Mr. Waddington.*) You receive all the prisoners who are tried at the Surrey Sessions, do you not ?—We receive every prisoner who is committed for trial, and every prisoner who is remanded, from all parts

of the county of Surrey, and every such prisoner who is sentenced to death at the Central Criminal Court is sent back to us for execution.

2318. (*Mr. Hunt.*) How may executions have there been at Horsemonger Lane since you have been chaplain?—There have been tried for murder during the 10 years 28 persons.

2319. Does that include cases of infanticide?—No; it is exclusive of infanticide, which would be quite as many more. Of those there were acquitted, seven; there were acquitted on the ground of insanity, four; there were condemned to death, six. Of those six, four were executed, one was pardoned, and one had the sentence commuted to imprisonment for life, the remainder had various sentences of imprisonment for different periods.

2320. When an execution has taken place there, have you made it the subject of conversation with the other prisoners in the gaol at the time, or about the time?—I have so far done so as to see what sort of impression the fact of an execution being about to take place would make upon them, and after it is over to see to what extent their feelings have been acted upon, but they are so very reserved and reticent that it is very difficult to get information from them, but I have asked the warders, with whom they are far less reserved, and I have stated the result.

2321. You have difficulty yourself in getting their real sentiments?—Very great difficulty.

2322. To what do you think that that is owing?—To being in a different class of life. I think that they *suspect* that you might give evidence to their detriment; I think that they have a sort of instinct that you are antagonistic to them.

2323. (*Mr. Waddington.*) Have you had many assaults upon warders by prisoners in your time?—I do not remember more than one, I think, during the whole of my experience, that was by a ticket-of-leave man.

2324. (*Mr. Neate.*) You say that of the six persons who were convicted, one was pardoned?—Yes, that was a man well known, named Smethurst.

2325. (*Mr. Waddington.*) It was at Richmond that he was supposed have committed the murder of which he was convicted?—Yes.

2326. (*Mr. Justice O'Hagan.*) Do you not think that the danger to the warders would be very much increased if the fear of Capital Punishment did not operate upon the prisoners?—I do not think so. I think that they would probably use a little more precaution, and that a little more precaution might be necessary, but not that life would be endangered.

2327. (*Mr. Hunt.*) The warders themselves would think that it was needful to take more precaution?—I do not think that the warders generally are in fear.

2328. It would show that they themselves thought that there was greater danger?—That would be matter of experience. I do not think that they would feel more fear in consequence.

2329. (*Mr. Neate.*) You do not think that the increase of fear to warders is sufficient to constitute any practical difficulty in abolishing the punishment?—Certainly not.

2330. (*Mr. Justice O'Hagan.*) You think that measures might be taken to make them as secure as they now are?—Yes; I should not myself have any fear whatever.

2331. (*Mr. Neate.*) From your intercourse with the criminal classes are you not disposed to think that they are not much deterred by Capital Punishment?—I do not think that they are deterred to any appreciable extent. I think that an injury is inflicted upon society by

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Capital Punishment, inasmuch as it deteriorates the moral sense of the masses. I think that it brutalizes them.

2332. (*Mr. Waddington.*) I understand that you say that the persons who think about the consequences of their crime at all would be as much deterred by penal servitude for life as they are now by Capital Punishment?—I think so.

2333. But that the greater portion of them now do not think of the consequences?—No.

2334. Or that if they do they reckon upon entire impunity?—Yes, and I think that the great uncertainty renders them entirely reckless.

2335. (*Mr. Hunt.*) Have you any reason to suppose that any person who has been executed at Horsemonger Lane was innocent?—I have not the least doubt that in every case the person executed was guilty.

2336. (*Mr. Waddington.*) And so in the case of some who were acquitted?—I think that one man who had his sentence commuted certainly deserved hanging more than a man who was executed.

2337. Was that the Croydon case?—No; I speak of the case of a man named Mahaig.

2338. That was, I think, a man who was found guilty of aiding and abetting a woman in committing suicide?—He murdered the woman and cut his own throat.

The witness withdrew.

Adjourned to Friday next at 12 o'clock.

Friday, 3rd March 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
THE LORD ADVOCATE, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

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Mr. THOMAS BEGGS examined.

2339. (*Chairman.*) You are honorary secretary of the Society for the Abolition of the Punishment of Death?—I am, and have been so for the last 12 years.

2340. You have given considerable attention to this subject for upwards of 25 years?—Yes.

2341. During that period, have you made inquiries as to the causes of intemperance, poverty, and crime?—I have been engaged in a great many inquiries in connexion with my own particular pursuits, literary and otherwise.

2342. During that period have you formed an opinion upon the question of the punishment of death?—I have.

2343. Are you favourable or unfavourable to its continuance?—I am unfavourable to its continuance.

2344. Will you state, shortly, what reasons have induced you to come to that conclusion?—I think that it will probably save the time

of the Commission if I briefly refer to the first case which drew my attention very forcibly to the subject. On December 31st 1841 a man of the name of John Jones, who sometimes bore the name of Moore, a shoemaker, murdered his sweetheart, Mary Hallam, the daughter of a respectable labourer at Mansfield, in the county of Nottingham. He was executed on March 23rd 1842 ; he was a man of unsteady habits, and gave way to violent fits of passion. The girl declined his addresses, and he said that if he did not have her no one else should. After he had inflicted the first wound, which was not immediately fatal, she begged for her life, but seeing him resolved, asked for time to pray. He said that he would pray for both, and then completed his purpose. The wounds were inflicted by a shoemaker's knife, and her throat was cut barbarously. After this he kept on his knees some time, and prayed to God to have mercy on two unfortunate lovers ; he made no attempt to escape, and confessed the crime. After his confinement he behaved in the most decorous manner ; he won upon the good opinion of the gaol chaplain, and he was visited by the Bishop of Lincoln. It does not appear that he expressed any contrition for the crime, but seemed to pass away with triumphant certainty that he was going to rejoin his victim in heaven. He was visited by some pious and benevolent ladies of Nottingham, some of whom declared he was a child of God if ever there was one. One of the ladies sent him a white camelia to wear at his execution. Of course great crowds gathered at the execution, multitudes coming in from surrounding towns and villages, Mansfield, Newark, and Derby supplying a large per-centage of the strangers present at the same. I did not witness the execution ; but I arose early in the morning and carefully observed the people who came in from the surrounding neighbouroood. I may observe, that at this time I was engaged in very active work in relation to temperance societies and others, and was in a large manufactory where I had great opportunities of knowing the feelings of the working classes of society in relation to all matters of public interest. The crowds came thronging in from six o'clock in the morning. It would be well for those who contend for the deterrent influence of death punishment to mingle with such crowds. The expression was almost universally one of sympathy with the man about to suffer. The painful part of it was this, that the offence seemed to be entirely lost to those who were conversing about his fate. A horrible crime had been committed—a poor girl had been barbarously murdered —the supplications for her life, as well as those she made for a few minutes' time, that she might prepare for death by prayer, were disregarded. Her bereaved family were left with stricken hearts to mourn the loss of a daughter by a violent and sudden death, and yet all this seemed to have passed away from the minds of those who had come to see the murderer die. He was looked upon by many as the victim of a misplaced and unrewarded affection, and the sufferings of his victim were wholly disregarded. One man I heard say to a companion, who seemed to be his son, "I wish you and me were as ready to die as he "is." By the way this wretched man was fondled, caressed, and flattered by a number of indiscreet persons, injury would be done to himself. Such treatment to a man whose hands were reeking with a foul murder was calculated to nourish that vulgar but profound egotism, which was the most marked feature in his character, and little calculated to awaken that humility which is essential to true penitence. An intense egotism is the characteristic of all great criminals. In the case of a man who has consummated an irregular and criminal career by the commission of a murder it must be highly injudicious to inflate

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the mind by false hopes, either temporal or eternal. Such attentions as were paid to this man were calculated to produce a display of ostentatious penitence, or to create a self-confidence ill-suited to his position. On the public mind outside the effects were equally deplorable. To some, by the extraordinary attentions paid to him, he was raised into a hero or a saint, and made almost an object of envy among his own class. I may also say, that in this case I did not observe much of the licentiousness, levity, and riot which I have observed amongst the crowds whom I have seen assembled on similar occasions. After the execution there was a great deal of drinking, and this would be the result of bringing a large concourse of people a distance from their own homes for any purpose. They would on such occasions require refreshment, and the taking that would lead to excess in many instances. The evil results of congregating large masses of the people to witness an execution are in my judgment of less magnitude than the effects upon those who do not witness the execution at all, but who read the reports in the newspapers. The worst part of it is the sympathy drawn round the worst class of criminals. It is desirable to create a horror of the crime, but in this case the horror of the crime was lost in sympathy for the criminal.

2345. Assuming that Capital Punishment is retained, if it was to take place in private would it not do away with many of the objections which you have stated?—I think that it would not do away with the objection; I do not think that the strong objection is the demoralization at the place of execution which is so much dwelt upon, but in the widespread knowledge of all the circumstances connected with the last days of the criminal communicated through the public press.

2346. Am I to understand you to think that publicity should not be given to the trial and sentence of the prisoner?—I think that after the sentence is passed the criminal should be as much secluded from the world as possible. I believe that the very worst consequences follow from the publication of the last dying words, and all the circumstances attendant upon individuals waiting on him in prison, trying to awaken him to repentance, and so on, and I fear that private executions would surround the matter with an air of mystery that would only make those inquiries a subject of still greater anxiety amongst the multitude outside.

2347. (*Mr. Bright.*) If the punishment was not a capital one, is it your opinion that the public would take anything like the interest which they do in these criminal cases?—I think that they would not; and I think that there are facts to prove it,—several have occurred to me,—for instance, there was the case of the man Hall, at Birmingham. I have the best assurance from men who mix in public life in Birmingham, that immediately after the respite of that man was granted all anxiety and curiosity about him ceased. I believe that it is the punishment of death which gives the piquancy, if I may so term it, to the public curiosity.

2348. (*Mr. Ewart.*) Do you think that this false interest which is taken by the public would be diminished if the executions were made private?—No; but on the contrary, I think that it would be increased.

2349. (*Mr. Bright.*) Do you recollect the celebrated case of Fauntleroy, who was hanged for forgery many years ago?—I recollect the case particularly well. I was not in London.

2350. Do you recollect the tremendous interest which was excited throughout the country with regard to it?—Yes, there was very great interest.

2351. Have there not been since the abolition of Capital Punishment

for forgery, other great cases of forgery which have excited very much less interest?—I think that the case of the late member for Lambeth, Roupell, excited infinitely less interest, and it seemed to be a case in enormity of greater magnitude than Fauntleroy's.

2352. Do you attribute that mainly to the fact that the public knew that Roupell's life was not in danger, and, therefore, there was none of that mysterious interest excited?—Entirely so.

2353. (*Chairman.*) Are you of opinion that the punishment of death creates uncertainty in the administration of the law?—I am quite of that opinion. I would, with the permission of the Commissioners, refer to a few cases which have come under my special notice. I know that there is an opinion in some quarters that the punishment of death does not prejudice juries in a great many cases. My opinion is, that if the whole of the cases were carefully gone into, it would be seen that there is a much greater number than is ordinarily supposed. I have drawn out a few cases, and I have only drawn out those which I can speak to as having verified myself by going over them at the time. There was the case of Westron, who was tried for the murder of Mr. Waugh in 1856; the jury returned this singular verdict,—"We find the prisoner "guilty of wilful murder,—we do not think he ought to be acquitted "on the ground of insanity; but we recommend him to mercy, because "in his case there were strong predispositions to insanity." I think that that is rather showing that the jury there were seeking an opportunity of escaping from the punishment of death,—they could not escape a verdict of guilty. Mr. Justice Wightman, after conferring for some time with Mr. Justice Willes, addressed the prisoner, and said that the jury, who were the best judges in such a case, had come to the conclusion that, although he might be insane upon some points, he knew right from wrong, and they had recommended him to mercy. And that under these circumstances he should abstain from passing sentence of death, and merely order judgment of death to be recorded. This case, both the verdict and the judgment, was the subject of severe criticism from the press.

2354. Are you aware whether or not there was evidence brought at the trial on the subject of insanity?—I believe not.

2355. Then how came the jury to express themselves as they did?—This is exactly as it appears in the Annual Register. I quote that case, because I recollect that at the time the press was almost unanimous in its condemnation of the decision.

2356. (*Mr. Waddington.*) Of the Judge, or of the jury?—Of both. I believe that the "Examiner" asserted that the Judge ought not to have received the verdict. There was a case before Mr. Baron Martin at the Bodmin Assizes on July the 13th 1856. Ann Matthews, James George, and Richard José were tried for the murder of Matthews' infant by José. There was clear evidence from the girl Burns that Matthews and José drowned it after having previously tried to choke it. "The "prisoners did not deny their guilt as to murdering the child, but "merely gave a different account of the manner in which the crime had "been effected. His Lordship added, that although there was no evi-"dence to fix any one with the murder but that of Eliza Burns, still "the jury were quite at liberty to act upon her evidence, and if they "believed her, it was as foul a murder as ever was committed, as re-"garded the prisoner José. The jury then said they had agreed, and "that they found José 'guilty of manslaughter;' George, 'guilty as an "'accessory of the fact; and Matthews 'guilty of concealing the "'birth.'" Baron Martin said it was his duty to state that in the paper the jury had sent to him they had asked him whether they could find

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José guilty of manslaughter. That he had some doubt about it, and had consulted his brother Channell, and the answer that he had sent the jury was, "that he himself would either find him guilty of murder, "or acquit him;" but that he did not know any legal obstacle to their finding him guilty of manslaughter; that the jury had taken a most merciful view of the case; that his opinion certainly would have been that he should have either found him guilty of murder, or have acquitted him; but that it was the verdict of the jury, and he should therefore sentence José to be transported for life, and Matthews and George to 12 months imprisonment. The following is the remark of the Annual Register. "The evident absurdity of this verdict was the "subject of much comment. It was doubtless a compromise. It is "clear that, if the girl Burns was to be believed, a more horrible "murder could not have been committed; if she was not, the accused "were entitled to an acquittal." There was a case at the Central Criminal Court on November the 24th 1858, before Mr. Baron Bramwell. Isaac Harmond, a bricklayer, was charged with the willful murder of his wife by throwing her out of window after beating her with a poker. "The prisoner appeared to be drunk at the time or "shortly before." The prisoner was a drunken brute. The verdict in that case was manslaughter. Baron Bramwell said that the jury had felt themselves justified in considering the prisoner to be guilty of manslaughter; and he did not complain that they had returned this verdict; but he certainly should not have been dissatisfied if they had found him guilty of murder, and if that verdict had been returned he would have been hanged, and he would have deserved it. There is the case of Michael Hynes, who was tried at Winchester in July 1860. Michael Hynes, a serjeant, murdered Mrs. Skein, drunk; there was no reason, but expostulation; he was drunk and excited; the murder was not premeditated. The jury were reluctant to convict, and finally recommended him to mercy. The jury doubted as to malice, and after a long consultation told the Judge of their difficulty. Thereupon the Judge again clearly explained the matter. They then doubted whether death had followed from the wounds. Medical witnesses were then recalled, and said it had. Then the jury, after four hours more consultation, returned with fresh difficulties. At last they returned a verdict of "guilty," but strongly recommended the prisoner to mercy. The following is a stronger case, which was tried before Mr. Baron Martin on the 14th December 1863. Patrick Hirley, aged 25, was indicted for the wilful murder of Anthony Golding at Leeds. The foreman said, "We find him guilty of murder, but the "jury wish me to add that it is their unanimous feeling that, while in "the conscientious discharge of duty they have felt bound, accepting "the definition of murder as laid down by the Judge, to return that "verdict, they feel equally strongly that the circumstances of the case "are such as to remove it out of the number calling for the extreme "penalty of the law. It is their hope that his Lordship will cause "such a representation of their feeling to be laid before the Home "Secretary; and it has only been the belief that their strong represen-"tation of the circumstances to his Lordship would be effective which "has induced them to agree to the verdict. They have felt that while "on the one hand they were discharging their duty in accepting the "law from the learned Judge and acting upon it, on the other hand they "have a strong opinion that the difference of the circumstances in the "case from those of many others coming under the definition of murder, "makes it one in which the authorities might suitably exercise the "prerogative of mercy." His Lordship said, "Gentlemen, your re-

"commendation shall be attended to, but you must permit me to "observe that I regret extremely to hear you have been driven only to "a conscientious verdict of guilty of murder by the belief that the "sentence would not be carried into execution. I am bound to say "that that is a view not proper for a jury to take. The jury have "nothing to do with the punishment, they must act upon the law of the "land, and unless juries do that, there is no safety for any one. But "whilst I say that, I am quite sure you have most carefully, delibe-"rately, and conscientiously in this case considered your verdict, and "I will most assuredly make such a representation to the Home "Secretary as you desire. I have no power to say what the effect of "that representation will be, but it shall be made, and made in the "spirit in which you desire it." Then there is the case, which is very recent indeed, of John Devine, who was executed on May 2nd, 1864, for a very brutal murder committed upon a poor old man named Joseph Duck, by beating him to death with an iron bar. The jury recommended the prisoner to mercy on the ground that it was possible the prisoner did not intend to murder, but only to stun. Mr. Justice Willes could not support the recommendation, and the man was hanged. All these cases, I may say, I have gone into, and I quote them simply on that ground; and I believe that in all these cases the punishment of death had a great deal to do with the decision of the jury.

2357. (*Chairman.*) But in all these cases, as I understand you, the jury found a verdict according to the oath which they had taken, and found the prisoner guilty of wilful murder?—Not in all the cases. In the Bodmin case the verdict was manslaughter.

2358. But in many other cases they found a verdict of wilful murder?—Yes; but sometimes with very great hesitation. I would just say that ever since the case which I have first named, and especially during my residence in London, when I became actively engaged in connexion with the Society for the Abolition of Capital Punishment, I have felt that our position has been one of increasing difficulty from the importunities (and they are very much increasing) from all quarters whenever a man is to be hanged; there are very few exceptions. We are urged and often have to give offence to some of our best friends by not appealing to the Home Office. Even in the case of Müller we were pressed to take some steps, and subscriptions were offered to us to hold a public meeting in the city of London, I believe not for the purpose of saving the man from punishment, but simply of saving the city from what they call the pollution of a public execution. I know that subscriptions in several quarters were offered to us, but we have uniformly acted on the principle of never taking up any case unless we felt that there were very strong grounds, some doubt of the guilt, or some extraordinary extenuating circumstances. I think that I can appeal to no higher authority than the present premier. I have an extract from a speech by Lord Palmerston when Secretary for the Home Department.

2359. (*Mr. Ewart.*) For what purpose do you wish to quote it?—Simply to show that I do not think that the difficulty is, perhaps, so much after all with juries, that is to say, with a court of law, as with the efforts which are subsequently made to save the criminal after sentence.

2360. (*Chairman.*) Where was that speech of Lord Palmerston made?—In the House of Commons. His Lordship said, "But in "matters regarding life and liberty I am sorry to say that benevolent "individuals have very little conscience at all. You may depend "upon it that I have had too much experience of the truth of what

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"I have stated. I get applications signed by great numbers of most "respectable persons in favour of individuals with regard to whose "guilt there can be no possible doubt, or no doubt that they have com- "mitted the most atrocious crimes; that is a matter of every day "occurrence. Not long ago a member of the Society of Friends "actually tried to bribe a witness to absent himself from the trial of a "prisoner in order to screen the man from punishment, of whose guilt "no human being could doubt. If you had these second trials you "would have these pious frauds as frequently committed." I submit that that rather forcibly sustains my view as to the increasing difficulties of carrying out the sentence after it is really passed.

2361. But that was not in relation to Capital Punishment was it?—His lordship says "the most atrocious crimes."

2362. (*Mr. Waddington.*) That speech appears to have been made upon the question as to granting a new trial in criminal cases?—I think that it was; but I believe that it is an expression which every Home Secretary would support. I would refer to a speech made by the Lord Bishop of Oxford in May 1856.

2363. (*Chairman.*) Are you of opinion that Capital Punishment does not operate as a deterrent in a sufficient number of cases to justify its continuance?—That is my opinion, and perhaps the Commissioners will be kind enough to accept a paper which I read at York, before the Jurisprudence Department of the Social Science Congress. I have taken up that view. I have read this paper over again this morning, and I do not know that I can put it more forcibly than I have there put it.

The witness delivered in the following paper:

THE DETERRENT INFLUENCE OF CAPITAL PUNISHMENT. (*A Paper read at the Annual Meeting of the National Association for the Promotion of Social Science, held at York, September* 1864.) By THOMAS BEGGS, F.S.S., Honorary Secretary to the Society for the Abolition of Capital Punishment.

Whatever may be the general opinion as to the expediency of retaining upon the statute book the punishment of death, there will be no question as to the importance of the inquiry upon which the Commission appointed by Her Majesty during the last session of Parliament is about to enter. Those who have read the calendar of crime for the last ten years will, I think, arrive at the conclusion, that if the extreme penalty be retained, there must be some alteration as to the mode and manner of its administration. It is confessedly defeating its purpose. A painful feeling pervades the community that the law is not carried out with firmness, while among the humbler classes, an opinion has obtained that exceptions are made in favour of the richer at the expense of the poorer criminals. I need scarcely say, that the efficiency of the law depends almost entirely upon the public confidence in the law itself, and upon the integrity of its administrators. Without that confidence, it becomes not so much a terror to evil doers, as an object of distrust and suspicion to those who desire to do well. Some cases, to which I shall have more particularly to allude, have tended to nurture the uneasiness which has been growing for many years past. Sometimes there is much difficulty in securing the conviction on a trial for murder, while in other cases it becomes almost impossible to execute the sentence; and in some instances of imputed or supposed insanity an unfortunate collision has taken place between the highest legal and medical authorities. Under these circumstances the law is deprived of much of its dignity and power, while an impunity is offered to crime by diminishing the chances of conviction, and increasing the chances of escape after a conviction has been secured. It is necessary to look these things fairly in the face, with the view of effecting such changes as will bring public opinion into greater harmony with the law. It is important, moreover, to inquire whether the

difficulties are not inherent in the law itself, and whether they do not arise from the nature of the punishment it provides. I believe that this is the conclusion to which a fair investigation will lead. If, however, a contrary conclusion be arrived at, then we must reconcile ourselves to a sad necessity, and try to remove the anomalies which attend the execution of the law. It is clear that we must renounce the punishment of death altogether, or enforce it with a stronger and a firmer hand.

I believe the labours of the Commission will lead to valuable results, in directing public attention to the proper points of inquiry; by collecting and systematising much evidence that lies scattered abroad, and by condensing into one report the opinions of the most eminent jurists in all parts of the world. With a humble hope that I may in some way be able to assist the inquiry I have ventured to bring the subject before this Association.

In doing this it is very satisfactory to find that the ground of debate has been much narrowed of late years. It would be idle now to reply to those who were wont to taunt the advocates of the abolition of Capital Punishment with a maudlin sentimentalism. A single sentence will suffice to say that our respect for human life is as great, and our sympathy with the murderer just as little, as that of the stoutest advocate of death punishment. There are many grounds upon which the demand for abolition is preferred, but I may frankly say that my objection to Capital Punishment is not founded upon the abstract sacredness of life. I concede at once the perfect right of a community to take the life of the murderer, if by that means the lives of its citizens are rendered more secure.

I object to a spirit of retaliation or vengeance being made an element in any kind of punishment, but would place in the hands of the civil magistrate, the most ample and extreme powers of punishment where the safety of human life is concerned. This I apprehend ought to be the highest object of legislation. If Capital Punishment does not secure this end, then its retention is a mistake and a cruelty.

Much need not be said on the demoralization attendant upon public executions. The suggestion made in so many quarters that criminals should be executed in private, is a confession that the scaffold has entirely failed as an example, and that the spectacle is injurious to the crowds who witness it. One word as to private executions. The open profligacy would be prevented but what I regard as the greater mischief would remain. The moment any circumstance of horror is surrounded by a shade of mystery, that morbid curiosity, which prevails in a greater or less degree among all classes of men, is increased and intensified. One of the strongest evidences of a deplorably low taste among the people, is the avidity with which the papers are bought up which contain the account of any particular atrocity, and those which give the most minute details command the largest sales. This unfortunate excitement will always exist as to the crime and the criminal, but I fear that it would be much greater as to its final end, if an air of privacy or secresy was thrown over it. The accounts which are given in the newspapers of the conduct of the condemned up to the time of execution, circulate over every part of the kingdom, and by covering a larger ground do much more mischief than that which takes place at the foot of the gallows. If executions were carried out in private, there would be quite as much excitement among the readers of these accounts, whilst the privacy would encourage all kinds of suspicions and conjectures. In some cases there would be a suspicion that the execution had not been carried out. It was, I remember, gravely asserted in a newspaper some years ago that Fauntleroy had not been executed, and this most improbable statement was credited by many. If such a suspicion could be entertained in a case where many thousands had witnessed the execution, among whom there must have been some who knew the person of the condemned, what would be said in other cases of criminals less known, and where circumstances might seem to favour the notion that those in authority would willingly connive at the escape? It is little to the purpose to show that such notions are unreasonable. In times of excitement the most preposterous surmises and the most monstrous statements receive popular credit.

At the first assizes held in the city of Manchester the grand jury represented to Mr. Baron Pigott their belief of the evil effects of Capital Punishment publicly carried out in the streets of Manchester, and they urged the propriety of exe-

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cuting capital sentences within the walls of the prison. The *Times* newspaper of August 2, 1864, gives the report of the presentment, and in a well-reasoned article says, "There are obvious reasons against anything like secresy in the "carrying out of Capital Punishment, of which the grand jurors seem themselves conscious. They talk of making proper regulations and securities for "the due fulfilment of capital sentences, but it must be remembered that these "precautions must be framed so as to satisfy the most ignorant, and therefore "the most suspicious, classes of the people. The absence of publicity is almost "necessarily attended by an absence of certainty, and on the rare occasions "when a man of superior education is condemned to death, painful questions "would arise as to the reality of the sentence passed upon him." The *Times*, however, suggests the propriety of reverting to the old practice of executing criminals at a distance from the seats of population—in what the writer terms "solitary places,"—particularly where peculiar circumstances of atrocity have marked the crime, or where there has been a special interest attending the criminal. I think it will be found that the evils complained of in public executions have not increased, but on the contrary, since they were removed from Tyburn to Newgate—and we have now to look at the greatly increased facilities for masses of people passing from one locality to another. I fear that such an attempt would extend the evils against which it seeks to guard over a larger area of district, and over a greater number of spectators.

I come now to a much graver consideration—the impunity which the law as at present administered offers to the worst class of criminals. In cases of infanticide, even in the very worst cases, no execution has taken place for many years—and therefore it is only a matter of common sense to make the law in accordance with the practice. As to the other classes of murder, it appears by the judicial statistics that the chances of conviction in cases of committal for murder are as one to three, while in all other offences, the chances are as three to four. I append a table which is simply a digest of the judicial statistics. It will be conceded at once that the crime of murder is more difficult of proof than other offences, as the murderer tries to destroy the evidence of his guilt. There is generally no witness, and there is necessarily greater scrupulousness in coroners' juries and the juries of criminal courts. Making the most of all these deductions, the proportions when fairly considered are very striking. This gives an additional chance and temptation to the man contemplating the worst of crimes, and is exceedingly dangerous to society. It has now become an axiom among jurists that the efficacy of punishment does not depend upon its severity but upon its certainty. The principle is fully borne out if we look at the statistics of these offences for which Capital Punishment has been repealed within the present century. The punishment in all these cases was abolished in face of the most solemn remonstrances from persons high in authority—but abolition in each case was forced upon the legislature by the impossibility of securing convictions. The injured parties would not prosecute, juries would not convict, and even the judges would suggest suppressions or distortions of evidence to evade a sentence involving death. The law became almost a dead letter, and the chances of escape were so numerous, that the fear of punishment had little weight with men who were tempted to commit crime and defeat the claims of justice. When it was felony punishable by death to steal from the person to the value of 40*s.*, pockets were picked at the very foot of the gallows.

These things were, in fact, only in anticipation of what is now taking place in relation to the only crime for which the capital penalty is retained. It is difficult to secure convictions, and in France, where the law admits of a verdict with extenuating circumstances, it is a matter of common complaint that such a qualification is often appended in contradiction to the clearest evidence. These verdicts, however, are a practical protest against Capital Punishment. Many cases will occur to those who listen to me, where verdicts have been given in this country which have been opposed to the obvious justice of the case. It does not lie with the juries alone; but after sentence the Home Secretary finds it sometimes impossible to carry out the law. There cannot be the slightest blame attached to the present Home Secretary, whose conscientiousness and humanity in the discharge of his duties do not admit of question. The fault is in the law. Several recent cases have given rise to a painful feeling on many grounds. There was the case of Jessie Maclachlan. I happened to be

in Glasgow at the time the movement was making in arrest of judgement. I conversed with many gentlemen who exerted themselves in her behalf, but I did not find one who had a conviction of the woman's innocence—they simply argued that there was a possibility of it—and that possibility stimulated them to save her life. The efforts of men disinterestedly labouring in a work of humanity will always command respect, however mistaken may be the direction it takes, or however unfortunate the end. A popular feeling had been created which was utterly incapable of attention to calm reasoning, and perhaps the public mind, at any time, is unfitted for the task of sifting and weighing evidence. Without any wish to undervalue public opinion, or to check its expression, I think that the less it interferes with the decisions of our criminal courts the better. There may be much in the procedure of our courts requiring alteration and reform, but they stand unrivalled before the world for the care and labour bestowed upon the cases brought before them, and for the integrity of their awards. It cannot serve the cause of justice or humanity that an agitation out of doors should reverse the decision of a judge or jury. In this case, the movement which saved the woman's life was one of feeling not of reason, dictated by the heart not the head. Had the punishment been anything short of death, I am satisfied there would have been no voice lifted in her behalf.

I will take the case of Townley. The whole of the circumstances were most embarrassing. The sentence of the court was altered by a weight of medical testimony, much to the dissatisfaction of a large section of the public. Then followed the case of Wright. Great effort were made to save this man's life, but all appeals were made in vain. The feeling in the neighbourhood of Lambeth—the scene of the murder—and where both the unfortunate man and woman were known, was of intense excitement. On the morning of the execution the dreadful preparations were accompanied by loud shouts of "shame" and "Townley." The expressions of sympathy with Wright were most emphatic. Among the working classes the feeling prevails to this hour that a great injustice was done in this case, and that Townley was reprieved because he belonged to a higher class in the community, and that Wright was made an example because he was a poor man. The feeling was by no means confined to Lambeth, for at the execution of a man at Nottingham for the murder of his mother, the populace called out "Townley," a very emphatic expression of public dissatisfaction at the respite in one case and the execution in the other.

The cases of Townley and Wright were followed by that of Hall, for the murder of his wife at Birmingham. This man was reprieved, but on what ground? The Home Secretary at the last hour yielded to the importunities of the people of Birmingham; but he stated that the conviction which in the first case had dictated his refusal to advise a respite remained unaltered, and that he yielded to the opinions of a large section of the people of Birmingham, who, not otherwise favourable to the abolition of death punishment, had pleaded for mercy in this case. This will show, I think, that the Home Secretary ought to be relieved of a duty which requires more than human firmness to carry out, and where it is seen that he is compelled, in opposition to the decision of the court and his own convictions, to yield to the pressure from without. I believe there were none of the working men who exerted themselves in the case of Wright but rejoiced at the escape of Hall, but it added to the bitterness with which they regarded the execution of Wright. In the case of Wright, the woman murdered by him was well known to be of dissipated and desperate character, and the evidence to support the plea that the murder was deliberate and of malice aforethought was by no means conclusive. In the case of Hall, whatever might be the nature and extent of the provocation, there was no doubt that the murder was deliberate, and planned hours before its execution. For Townley there could be no plea but that which ultimately prevailed—that of insanity. It will be long before the recollection of these cases, those of Townley, Wright, and Hall, will be worn from the minds of the humbler classes.

But the grievous point is this—the large amount of sympathy which in some cases is drawn around the criminal, almost to a forgetfulness of the crime. All these men had committed great crimes, crimes which admit of no excuse or palliation, and it is essential for the public safety that a due horror of the crime should be inculcated. But what are the effects? In Wright's case it

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was the remark of many who observed the efforts made in his behalf that the fate of the murdered woman, and the sinfulness of the act which sent her to her account, with all her sins upon her head, was entirely overwhelmed by the sympathy for him. In the case of Hall there was even a worse result. I have it from a friend, upon whose judgment and means of acquiring information I can implicitly rely, that the fame and character of the murdered woman were blackened by reports which had only feeble foundation, and that facts in relation to her were distorted and exaggerated to substantiate a case in his favour. This would be done unconsciously by those engaged in a work of mercy, but we know how little reliance can be placed upon statements which are current in periods of popular excitement. The shadow of the gallows frightens men from those serious contemplations which ought to occupy the mind in the presence of a great crime.

The punishment of death confounds all gradations of guilt. In cases of horrible and peculiar atrocity the public mind is absorbed by a spirit of vengeance. In cases where there are extenuating circumstances a sympathy for the criminal prevails. In one class of cases the horror of the crime may close the mind to a proper consideration of that evidence which is in favour of the accused, and in the other case a sympathy with the guilty favours their escape. It is most undesirable that men with insane tendencies or ferocious passions should have any chance of going back into society through either a mistaken leniency on the part of the public, or of extreme severity in the law.

In the last debate in the House of Commons the defence of Capital Punishment was based almost exclusively upon its deterrent influence. This has always been used as a strong argument by Sir George Grey, and it is embraced as such by a large portion of the public. It is, however, one of those speculative arguments which does not admit of positive refutation. We can only examine it by the test of experience. To pursue it fully it would lead us into the field of psychological inquiry. I must content myself by indicating the several points involved in the consideration rather than discussing them. The postulate is this, that as the love of life is the most powerful instinct implanted in man by his Creator, therefore the prospect of a sudden and violent death under circumstances of public shame will be most likely to deter the man who is tempted to lift his hand against another. It would be absurd to assert that the punishment does not answer its purpose in some cases, by deterring men who under strong provocation or excitement are tempted to take life, but the question is whether the number of such cases, and the number is not ascertainable, is sufficient to compensate for all the acknowledged evils and difficulties attendant upon Capital Punishment. I am satisfied that the argument will lose strength the more steadily it is looked at. A general proposition of this kind is no sooner made than special exceptions at once start up, but these require to be examined just as carefully as the proposition itself, so that each may be placed at its proper value and at the proper side of the account.

As to the love of life, the instinct is all powerful, and we find men cling to life under the severest privations and the most extreme sufferings. It survives every loss. But yet we find men peril it for trifling aims, and for the promise of the most insignificant gains. Such is the mysterious link binding man to life, that death is rarely ever looked at from a distance. There are some to whom the dread of death is a daily terror, driving the mind to insanity, and in some cases to suicide, but these are rare exceptions. The mass of mankind live and act as if death was a distant evil, forming no part of the expectations of to-day. It is reserved for the consideration of to-morrow. The class of men who under the influence of strong passion or powerful temptation are brooding over a great crime are least likely to entertain such considerations. It is worth inquiry whether, in the category of great crimes, murder is not that one which is least likely to be prevented by the fear of death operating upon the man who contemplates its commission, and on the principle that the more desperate and violent the passions which hurry on the mind to any deed of crime the less likely are those passions to be arrested by prudential motives of any kind. The uncontrollable ferocity or deliberate wickedness which prompts the crime of murder are the least likely to be awed by a dread of the consequences, even if the consequences are ever thought of at all. To give potency to any deterrent influence it should be present in the hour of temptation.

So far as we are able to manipulate the cases of murder, I submit that this

view is borne out. In one class of crimes we find that the murderers have laid their plans with much care and circumspection, and with the expectation that detection was a very improbable if not impossible consequence. This was the case with Thurtell, Palmer, Rush, the Mannings, and many others. In other cases the murderer has acted with deliberation, but without making any effort at concealment or escape. Such was the case with Townley, with Hall, and the two men recently executed at Maidstone for the murders of unoffending children, and who had declared openly that they wished to be hanged. Other cases will at once occur to those who have watched the records of our criminal courts.

There is another view to which I must direct attention, as most important in this part of the inquiry, namely, the coincidence of the homicidal with the suicidal insanity. Great watchfulness is observed in all cases of committal on charges for murder to prevent suicide. Mr. Sampson, in his work on criminal jurisprudence, says, "Those who will take the trouble to refer to any considerable "number of cases of murder will be struck by the remarkable fact, that the "homicidal is almost invariably accompanied by the suicidal tendency, and "hence, that persons who are in the state of mind which renders them capable "of attempting the destruction of a fellow creature, are usually at the same "time capable of self-destruction. In a proportion of at least two out of three "cases this peculiarity is evidenced either by the circumstance that the individual "has attempted suicide previously to the commission of the murder, that he "has destroyed himself immediately afterwards, that he has given himself up to "justice at once, expressing at the same time a desire to be hanged, or that by "his previous conduct he has evinced the absence of any solicitude so to lay his "plans as to enable him to escape from its consequences." Mr. Sampson in continuation refers to the number of murders committed in five years from 1831 to 1835. They amount to 31; of these there were no less than 21 cases where the desire for self-destruction was more or less manifested. Mr. Sampson gives a citation of these cases taken from the "Annual Register." In the "Manual of Psychological Medicine," by Drs. Bucknill and Tuke, this view is supported. On page 224 it is stated, "Suicide so often succeeds the homi-"cidal act as to indicate a very close relationship between them, due allowance "being made for the mere desire to escape punishment or disgrace. It has been "calculated that in 60 per cent. of cases of murder, suicide is attempted." This is the concurrent testimony of all observers on the subject, and taking it as fully proved, then, I think, there will be a general agreement that minds labouring under an incipient malady of this kind are likely to be excited to acts of violence against themselves or others by reading or hearing read the reports of suicides, murders, and executions. It is matter of common remark that a particular atrocity is followed almost invariably by similar acts, and this is partly due to the imitative faculties common to man, but more especially to the fact to which I have adverted, namely, that morbid affections and passions are aroused to unnatural activity, by the published accounts of deeds of violence and bloodshed.

How far, then, Capital Punishment is calculated to influence the class of minds afflicted by such insanity? How far the terrors of the law are likely to deter such minds from the act of murder? These are questions which really affect the issue. It is not much, if anything, to the purpose to say that criminals, under the sentence of death, almost invariably express a desire for life, and would accept the severest kind of secondary punishment instead. This desire, it must be observed, is expressed when the prison cell has closed upon the culprit, and when there is no door of escape but that which leads to a shameful death. The paroxysm of passion is spent, the holy offices of the chaplain have called back all that is left of better feeling, and there is not only before the mind the doom of the hangman, but the doom beyond the grave. It does not affect the argument much that the wretched criminal, left to his own thoughts, with all the outer world excluded—and under such circumstances as I have named—should cling to life. The prospect of the penalty, to answer its purpose, ought to have been present in the hour of temptation, and to have saved him from the guilt. In his case it has not operated as a deterrent. The terror of the doom ought to be present when the hand is raised to strike—it is too late when the blow has been struck. Cases of suicide, again, supply some valuable facts much in point. In some cases, where the attempt has been arrested, or

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the victim restored after the attempt, the deed has been regarded with great horror, and the mind affected by deep contrition. It is said, on very good authority, that those who have attempted suicide without succeeding rarely make a second attempt unless labouring under decided and permanent insanity, and cases are known where suicide has been attempted by cutting the throat, and where, after the brain has been relieved by a flow of blood, a desire for life has supervened, and life might have been saved, had the bystanders known how to apply the pressure of the finger until a surgeon had arrived. The feelings, therefore, which come upon the mind after the commission of some desperate act, afford no data by which to judge of the feelings which were present during the commission of the act itself. They have often little or only feeble relationship with each other.

It will be generally admitted, I think, by those who have given attention to diseases of the mind, that the men who commit murder come generally either from a class who may be called dangerous lunatics, or those whose minds, unevenly balanced, are likely under sudden impulses or strong excitement to become insane. Dr. Laycock in an able paper on the case of the man Bryce, who has been recently executed in Scotland, says, "There is a notable increase "in the number of insane murderers, and that is due, not to the increase of "lunacy, but to the fact that there is a greater number of dangerous lunatics "at large, and these are so at large, because of the legal doctrine as to insanity "and responsibility."

In the face of such evidence, evidence which is incontrovertible, is not the argument for the deterrent influence of Capital Punishment altogether a mistake? It is clear that it does not influence those who commit murder. Can it be shown, or is it reasonable to suppose, that it is potent in so many cases as to compensate us for all the acknowledged evils of public executions, and more especially for the uncertainty attendant upon the committal, conviction, and execution of the criminal who has committed murder.

That uncertainty which supplies another motive to the mind brooding upon an act of revenge or cupidity, and which is capable of entering upon a calculation of the consequences, will I apprehend continue so long as Capital Punishment continues. Men will shrink from becoming agents or ministers in carrying out a law which makes no distinction in the degrees of guilt, and which becomes capricious and difficult from its very severity.

The statesman who, in vindicating a penal code, suffers the question to be decided by his own consciousness rather than by studying mankind under all the varying stages of social and political progress, and as affected by climate, custom, and law, is greatly liable to err. In fact this is the fundamental error at the bottom of many of our schemes of reformation and improvement. Those who have to prescribe punishments for certain transgressions of the law are apt to look at that which would be terrible to their own minds rather than that which is most likely to operate upon the fears and passions of those for whom the law is made, of those in fact who have inclinations towards evil. The class of minds who would be influenced by the fear of death punishment are probably those who would not be capable of cherishing the idea of committing murder under the most powerful circumstances of trial or provocation. To a man treading the path of usefulness and honour, and surrounded by all the associations which give value to life, the bare glance at the scaffold with all its ghastly accompaniments, would be horrible in the extreme, and might overcome any strong temptation to an act of rapacity or vengeance. Such are the men who generally devise laws for states, but they have to legislate for men whose career is the very opposite of their own. Such men as I have named are not always the most competent to estimate the effects of law and punishment upon the ignorant, the depraved, the partially imbecile, or the insane. Men of calm thought and studious pursuits sitting in council chambers, in quiet deliberation upon the causes of crime and the means for its repression, are not always able to discriminate effect from cause, or properly calculate the value of the measures they adopt. Hence our mistakes in criminal jurisprudence. The question is not what will affect the mind under its usual and ordinary moods, but what will operate when disturbed by disappointment, by jealousy, by resentment? What will be most likely to influence the minds of those who, with a proclivity to evil, are goaded by passion, tempted by avarice,

or influenced by intemperance? I submit that it is a mistake to suppose that the punishment, or that any of the consequences, are thought about at all in the majority of cases, and that always supposing that the mind is capable of reasoning at all, the consciousness that detection and conviction for the offence would be speedy and all but inevitable would be far more efficacious in restraining the hand raised to strike than the most severe punishment. The legislator must, moreover, make proper allowance for the difference in character and disposition of the masses for whom he legislates. Men do not differ more in their physical than in their mental and moral constitution. There are some, and it is a large class in society, who are brought into the world with defective and unhealthy organizations, and who have been exposed to vicious training, bad example, and early temptation, and who are susceptible of sudden impulses, and easily excited to acts of violence. There are some who seem deaf to the voice of conscience or of law. We have not as yet learnt to estimate the philosophy of the Divine Law which visits the sins of the fathers upon the children, nor shall we be able to legislate wisely and well until its import is fully understood. There are many loose in society, who under proper regulations ought to be under supervision or restraint, many are condemned as criminals who ought to be treated as patients, and it is to be feared that many have suffered death, who were no more accountable for the crimes they had committed than they would have been accountable for an attack of disease, the result of hereditary taint, or contracted by living in the abodes of fever or pestilence.

We have learnt by experience how vain and useless is the effort to extirpate crime, or even keep it in check, by penal laws. During the present century we have seen that sanguinary punishments tend to augment the number of offenders, and feed the passions of the multitude. One by one the capital penalties have been repealed, until virtually only one remains, and that for murder. It can be shown that all these ameliorations of our criminal code have been attended with favourable results. Why, then, not follow in the same course, and abolish the punishment of death altogether?

I ask for the abolition on the grounds that no sufficient reasons are given to render it even probable that the supposed deterrent influence operates in a sufficient number of cases to justify the continuance of the penalty, with all its manifest and manifold disadvantages. I object to the punishment of death because it teaches to the people a lesson of vengeance, and this is inevitable when, in the language of the Roman writer, the punishment bears resemblance to the crime. I object to it also on the ground of its uncertainty—an uncertainty which I believe cannot be corrected by any refinement in the law, nor by any care exercised by those who administer it. It is not within the reach of human attainment that we can discriminate where responsibility ends, and where irresponsibility begins. And this difficulty will always beget doubts and scruples; doubts and scruples which interfere with the process of law and defeat the ends of justice. I hold that the punishment of death does not answer its purpose, and that its doom is near. It is only a question of time.

Appendix.—Statistics of Murder in England and Wales.

[*Extracted from the "Judicial Statistics" annually presented to Parliament.*]

I. For the three years 1857, 1858, 1859 (quoted by Lord Hobart in his Essay "on Capital Punishment.")

Murder.

	Actual No. Committals.		Convictions.
Proportion of Committals to Convictions, 4 to 1	206	to	54
	Convictions.		Executions.
Proportion of Convictions to Executions, 5 to 3	54	to	33
	Committals.		Executions.
Proportion of Committals to Executions, 6 to 1	206	to	33

Same Period for all other Crime.

	Committed.		Convicted.
Proportion of Committals to Convictions, 4 to 3	54,798	to	41,020

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II. For the four years 1860, 1861, 1862, 1863.

MURDER.

	Actual Numbers.
Proportion of Committals to Convictions, 3 to 1	273 to 99
Proportion of Convictions to Executions, 3 to 2	90 to 63
Proportion of Committals to Executions, 4 to 1	273 to 63

SAME PERIOD—FOR ALL CRIME.

	Actual Numbers.
Proportion of Committals to Convictions, 4 to 3	75,144 to 57,058

III. For the seven years 1857 to 1863 inclusive.

MURDER.

	i.e. in Actual Numbers.
Proportion of Committals to Convictions, 3 to 1	479 to 153
Proportion of Convictions to Executions, 3 to 2	153 to 96
Proportion of Committals to Executions, 5 to 1	479 to 96

SAME PERIOD—ALL CRIMES.

	i.e. Actual Numbers.
Proportion of Committals to Convictions, 4 to 3	129,942 to 98,078

2364. You think, for the reasons stated in that paper, that Capital Punishment does not operate as a deterrent in a sufficient number of cases to justify the continuance of the punishment of death?—I do.

2365. Are you of opinion that it confounds all gradations of crime?—I think you will also find that that is treated in the essay which I have delivered in, not so fully, perhaps, as I might have wished to treat it, but at York I was confined to 20 minutes, and it was somewhat difficult to get a whole argument into that short space.

2366. Are you of opinion that private executions would not satisfy the public mind?—I am convinced that they would not satisfy the public mind, but the greater evil is, that they surround these cases with an air of mystery. I think that, however compatible they may be with the institutions of other countries, they are scarcely compatible with ours; we have open courts of law, and open discussions in Parliament, and all our institutions are open, and I think that private executions would not satisfy the public. I attach some importance to an argument adduced by the "Times" newspaper, which I have quoted in my essay, namely, that there would be very considerable doubts. I have mingled a great deal amongst the working classes of society, and I am sure that no person would wish to increase the feeling which is much too prevalent already, namely, that there is a tendency to favour the rich at the expense of the poor. That is a very strong feeling, not only amongst the more unintelligent and uneducated, but even amongst the more intelligent and educated of the working classes. I know that in the case of Fauntleroy there was a very strong feeling; it was stated at one time that Fauntleroy had been seen in America after his supposed execution, whereas he must have been executed in the presence of a great many persons who knew him personally. The same thing has been said in other cases, and I fear that the effect of a private execution would be that in the case of men of education, or of position, or of wealth, who would be supposed, on account of their wealth, to command influence, there would be very considerable doubt whether the sentence had been carried out, and I think that you would only get rid of a minor part of the evil. It is supposed that the great evil of public executions is the demoralization which immediately surrounds the scaffold. I do not believe that at all. I believe that the greatest part of the demoralization is in the fact of the public press conveying the last words and last acts of the criminal to all parts of the kingdom, and

that would certainly be increased by the mystery with which you would surround executions.

2367. Are you able to offer any suggestions as to what you would recommend as a substitute for Capital Punishment ?—I know that there is very great difficulty in that respect, but I wish to point out to the Commission that this is an objection which I think has met every gentleman in the House of Commons who has laboured to obtain the abolition of the punishment of death for any offence. I will content myself by giving one quotation. I find that when Mr. Thomas Fowell Buxton spoke in the House of Commons, on May 23rd, 1821, on the bill for mitigating the severity of punishment in certain cases of forgery and the crimes connected therewith, the very second sentence of his speech was as follows :—"The Solicitor-General has stated, that no "efficient substitute for Capital Punishment has as yet been discovered, "and therefore that as yet the House is not in a condition to discuss "that species of penalty." I believe that Sir Samuel Romilly and Sir Robert Peel, and all other gentlemen who have laboured in the House of Commons to mitigate the severity of our penal code, have had the same objection to meet. I fear that if nothing be done until a substitute which will be satisfactory to all minds is found, we shall probably stand at a very remote distance from the abolition of the punishment of death. But I would wish to call the attention of the Commission to what is taking place at Broadmoor at the present time. I think that there are about 450 inmates of that asylum at present, about 400 men and from 50 to 60 women ; these are nearly all persons who have had their sentences commuted, or who have been respited during Her Majesty's pleasure on the ground of insanity.

2368. (*Mr. Waddington.*) A good many were acquitted on the ground of insanity, were they not ?—I suppose so.

2369. (*Mr. Bright.*) All these are cases of homicide in some shape ? —Yes. I think that when we can deal with 400 to 450 persons, comprising the worst and the most dangerous class of murderers, because the maniacal murderer is more dangerous under all circumstances than others, we can scarcely fail to deal with some 10 or 12, because I believe that our annual executions are about 10 or 12.

2370. (*Mr. Waddington.*) There were 22 last year ?—But I think that that is not the average.

2371. (*Chairman.*) You may take it at 15 ?—We have been down as low as 7 within the last ten years.

2372. (*Mr. Bright.*) Have you heard that there is any difficulty with regard to those criminal lunatics in keeping them from doing damage to their officers ?—There is no doubt very great difficulty, and they display the most extraordinary shrewdness in attempts to escape, and in attempts to do themselves injury, and in attempts to do their warders injury.

2373. Do you know whether the statistics show that they do frequently kill their warders, or that the precautions taken are in the main successful ?—I believe that the results of an inquiry will show that the precautions now taken are in the main successful, and that the instances in which the prisoners succeed in escaping or doing injury to themselves or to their warders are very few, and much less than might have been expected.

2374. (*Mr. Hardy.*) Broadmoor has only been open for about two years ?—That is so, and therefore two years scarcely afford a sufficient time for correct observation.

2375. (*Mr. Bright.*) Might not your reply to my question equally extend to other places besides Broadmoor. Taking the last 20 years,

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criminal lunatics have been confined somewhere, and the public have not been startled by the announcement of the frequent murders of the officers who have had charge of them?—I am not prepared to give statistics to show results, but I should be inclined to believe that the cases of attempts at self-destruction or of murder, have been rather numerous, and that one reason for establishing Broadmoor was to remove those persons from the different institutions of the country, so as to concentrate under one management all those cases which were the most difficult to deal with.

2376. But the cases are not so difficult as not to be able to be met?—They are able to be met.

2377. (*Mr. Ewart.*) Do you think that it would be more easy or more difficult to preserve the warders from attacks upon them in the case of sane criminals, than in the case of criminal lunatics?—I think that it would be more easy to deal with the sane criminals than with the insane, and on the ground that the sane man is more able to appreciate the consequences. From the opinions given by medical men with whom I have had opportunities of conversing both at home and abroad, I think that it would be so, and that the bulk of medical testimony would be in support of that view.

2378. (*Chairman.*) Are you of opinion that during the last 20 years many persons have been convicted of capital offences of which they were innocent?—I should not say many, although it is rather an indefinite term, but there have been some, and I think that I can produce evidence of one or two. I will first of all refer to the case of William Ross, who was convicted at the Yorkshire Summer Assizes in 1850. We memorialized the Home Office in that case, but not until we found that both the chaplain and the governor of the gaol were strongly of opinion that the man was innocent, and when I was in York at the Social Science Congress last September, conversing with several gentlemen who were not favourable to the abolition of the punishment of death, this case was referred to amongst others, and a strong opinion was held by six or seven residents of York who were present that this man was executed although he was innocent.

2379. (*Mr. Waddington.*) Do you recollect what Judge tried that case?—I do not, but I can supply that, because I have all the particulars of the case.

2380. (*Chairman.*) The man was not only convicted but executed?—Yes. The next case is a case where Capital Punishment would not have followed, but it applies very strongly to show that two innocent persons were convicted. On the 29th of December 1849 a girl of the name of Mary Ann Bennett preferred a charge of rape against two young men of the names of Shadrach Lewis and Isaac Hopkins, upon which they were convicted and sentenced to transportation for life. The sentence in this case did not give satisfaction in the neighbourhood where the parties resided. Inquiries were instituted, and the girl was indicted for perjury, and committed to prison. She was tried on the 10th April 1851, at Gloucester, before Mr. Justice Talfourd. It was proved that she had offered to contradict at the trial the evidence given on her first examination, on condition that Lewis's father and Hopkin's mother would give her 5*l.* each, and that she had declared after the men were put in prison that she liked Lewis very well, and that she would not have made any charge against him had she not been overpersuaded. This is a case in which at the very next assizes following the conviction of these men the very woman on whose evidence they were convicted was herself convicted of perjury.

2381. (*Mr. Bright.*) Your argument from that is, that if Capital

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Punishment had been maintained with regard to that particular crime these men, being innocent, might have been hanged ?—Yes.

2382. (*Chairman.*) My question was, whether you were of opinion that within the last 20 years many persons had been convicted of capital offences who were innocent, and you have given us one case, that of the man Ross; are there any others to which you can allude ?—I only intended in the case of William Ross to say that there was a strong public conviction that he was innocent, there has been no evidence since to show that he was innocent. There was the case of the man Sargisson, who was last year executed at Leeds along with a man named Myers. That was the first execution which took place in Leeds, a neighbourhood with which I am intimately connected, and there were some distressing circumstances attending the execution. I happen to know a great many of the circumstances associated with Sargisson, from the fact of a manufactory with which I am very largely connected being in the immediate neighbourhood of the scene of the murder, and I know that at this moment there is a very strong feeling that Sargisson was not the man who committed the murder. The impression is that the man who committed the murder was the man who turned approver, and there is a very uneasy feeling over the whole neighbourhood in relation to that case, especially amongst those who had known the man Sargisson, and more especially still by a man who had once employed him. I would refer also to a case at the last Durham Assizes, of a man being convicted and sentenced by Mr. Justice Keating, after a very strong expression of a conviction of his guilt by that learned Judge, and who was afterwards respited on the representation of Mr. Justice Keating himself. It was a case of rape.

2383. That was not a capital case, my question went merely to capital offences ?—I intended to say that convictions on erroneous evidence had arisen.

2384. Do you mean upon all questions of felony ?—Yes.

2385. (*Mr. Ewart.*) You mean that if it happens in a case not capital it may happen in a case which is capital ?—Yes.

The witness withdrew.

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2386. (*Chairman.*) You are a Member of the Royal College of Physicians ?—Yes.

2387. Have you been engaged for many years in the study and treatment of nervous and mental disease ?—Yes; I have studied it also in the public asylums. I have visited the principal public asylums in the country, and more especially Hanwell, where I was a pupil of Dr. Conolly for six years.

2388. Upon the question more immediately before us, namely, the abolition of Capital Punishment, you are not prepared, I understand, to give any opinion ?—I have not studied the subject at all. My opinion would be decidedly for the retention of Capital Punishment, on the ground that I do not see any satisfactory substitute for it, but I have not gone into the question.

2389. Do you consider that murder should be classified in any way ?—I think that it would be an improvement of our criminal law to have a verdict of murder, with extenuating circumstances, so as to meet such cases as that of Wright, who was executed a short time ago; but again I say that I have not quite gone into that question.

2390. That question you leave to the lawyers ?—I do.

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2391. Probably what you would speak more particularly upon, would be as to the plea of insanity which is set up in cases of murder ?—I have been much struck in studying cases, and in my own attendance upon trials for murder where the plea of insanity has been set up, with the result of the celebrated dictum of the 12 Judges, which is no doubt familiar to the Commission.

2392. (*Lord Stanley.*) You mean the definition of the law of insanity ?—Yes.

2393. (*Mr. Waddington.*) You allude to the resolutions of the Judges in McNaughten's case ?—I do ; I have them here as given in Shelford, but I may state them shortly as follows, namely, that the test of responsibility is whether the prisoner knows the difference between right and wrong.

2394. (*Chairman.*) What would you wish to say upon the plea of insanity ?—I think that the statute law is not so severe as the definition of the Judges would lead us to imagine, and that their definition in McNaughten's case has led to great error in the administration of the law as it stands ; I refer to all cases where the plea of insanity is set up under any circumstances. Being much struck myself with this fact, and knowing that the medical opinion generally was decidedly in consonance with my own, I proposed the following resolution last year, at a meeting of the Association of Medical Officers of Asylums for the Insane, which was unanimously adopted. The resolution was, "That "so much of the legal test of the mental condition of an alleged "criminal lunatic as renders him a responsible agent because he knows "the difference between right and wrong, is inconsistent with the fact "well known to every member of this meeting, that the power of dis- "tinguishing between right and wrong exists frequently among those "who are undoubtedly insane, and is often associated with dangerous "and uncontrollable delusions."

2395. (*Mr. Neate.*) How many gentlemen were at that meeting ?—I think there were 54 medical officers of asylums, besides English and foreign visitors.

2396. (*Chairman.*) Then you think that a man may be conscious of right and wrong, and still not be answerable for his actions ?—Certainly. One of the arguments by which our meeting was led to unanimously adopt that resolution was Sir Edward Coke's opinion, which is quoted by Shelford : "The execution of an offender is for an "example *ut pœna ad paucos metus ad omnes perveniat*, and the "execution of a madman would be a miserable spectacle, and could be "no example to others." This is given by Sir Edward Coke in his Institutes, and would appear to be an exact contradiction to the opinion of the Judges.

2397. (*Lord Advocate.*) Do you hold that insanity is a comparative or a positive state ?—Insanity must be a positive fact.

2398. Do you, therefore, hold that no insane man is responsible in law for his actions ?—I think that no insane man should be responsible to the extent of Capital Punishment.

2399. I wish to have your opinion upon the question of responsibility at all ?—I cannot quite answer that question so distinctly. I think that the question as to Capital Punishment is clear,—that no insane man should be liable to Capital Punishment ; as to minor offences, I am not quite so clear.

2400. Do you think that an insane man should be responsible to the law for his actions, I am not speaking of capital offences, but of any offence ?—It is very much a question of expediency. I think that, as a matter of moral right, he should not be responsible, but as a matter of

public expediency I think it very important that he should be held responsible to punishment for minor forms of crime.

2401. Your resolution states "that the power of distinguishing "between right and wrong exists frequently among those who are "undoubtedly insane, and is often associated with dangerous and "uncontrollable delusions." Supposing that the act which is in question is not apparently connected with the delusions under which the patient labours, and that he is capable of distinguishing between right and wrong, and knows that he is doing wrong, do you or do you not think that he is a proper object of punishment?—I cannot imagine a case where a delusion exists, in which case any expert or other person can say positively that that man's mind is sound upon other points, and, therefore, there being a difficulty, I certainly should, in a case where the punishment was so irrevocable as Capital Punishment is, not hold him responsible. In other cases I might do so, because it would not be irrevocable, and would not therefore be so essential.

2402. (*Lord Stanley.*) You mean that if there was a doubt in the case of a man sentenced to penal servitude for life it would probably be very soon discovered in prison whether he was sane or not, and that if he was insane the error could be corrected?—Yes.

2403. (*Lord Advocate.*) You do not consider it inconsistent with principle that a man though known to be insane should be punished for his act?—It is inconsistent with any moral principle, but I think it is very expedient to retain the power of doing it short of Capital Punishment, for the reason which I have stated.

2404. Do you think that a man who is insane is capable of being restrained from offence by the knowledge that he will be punished?—I think that some insane people most decidedly are restrained by the fear of punishment.

2405. (*Mr. Ewart.*) There may, I suppose, be a case of monomania?—Those would be cases of partial insanity.

2406. On one particular point?—On one or more particular points.

2407. (*Lord Advocate.*) Have you ever known cases where a lunatic committed a crime, believing that he could not be punished because he was insane?—No, I have never known such an instance.

2408. Do you think that that is possible?—I think that that is a process of reasoning so totally foreign to a lunatic's estimate of his own state that it is almost impossible. No man believes himself to be mad, and he would scarcely therefore argue in that way.

2409. (*Lord Stanley.*) Have not madmen been known to be aware of the time when a paroxysm was coming on?—Yes, and they have begged to be restrained. In my own practice I have met with that.

2410. (*Mr. Waddington.*) Let us suppose the case of a man who has a delusion, but upon a subject entirely unconnected with the murder which he commits; and let us suppose that when he commits the murder he appears to be in perfect possession of his senses, but that the defence set up at his trial is that he is entirely insane upon another subject, would you say that that man was responsible for the murder which he committed in reference to a subject upon which he was of sound mind?—I should most decidedly give him the benefit of the doubt; the mind being unsound on the one point, in all human probability it may be unsound upon the other.

2411. (*Mr. Bright.*) With regard to the infliction of Capital Punishment, in any such case you would be opposed to it?—I would rather abolish Capital Punishment altogether than commit what would seem to me to be a judicial murder.

2412. (*Mr. Waddington.*) You say then that a man who has a dis-

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cased mind upon any one point is not responsible to the law?—Not to the point of Capital Punishment.

2413. Would you admit that he was responsible to any other point?—I think that it might be expedient that he should be held responsible, but morally, I think, he would not be.

2414. Would it be just to punish him for the sake of expediency, if he was not morally responsible?—No, except that it might be extremely useful that the case should be tried upon its merits, in order to prevent some few madmen who are at large from committing crimes which they can control, which I believe is quite possible; but at the same time I should not strain the point against them.

2415. If you admit that argument in one case, does not it apply to Capital Punishment more strongly; is it not more useful to prevent persons from committing murder than from committing other offences?—But the punishment would not be irrevocable in other cases, the decision having been given the man would be found afterwards to be insane and pardoned.

2416. (*Lord Stanley.*) Have you heard the suggestion made, that in all cases of alleged insanity it would be better that the trial should go on without reference to the state of the prisoner's mind, and that the question as to his mental state should be an entirely separate one, to be dealt with afterwards by persons conversant with that subject?—That is exactly how I should propose to do it.

2417. (*Mr. Ewart.*) Or would you propose that the question of sanity or insanity should be tried before?—That it should either be tried before or afterwards.

2418. (*Mr. Hardy.*) Upon what footing would you try the question of insanity; would you try it as a question of insanity upon one particular point which might not affect the crime which the prisoner had committed; or would you try it as a question of insanity as referring to that particular crime?—I do not know that there would be any objection to the two mixing together, supposing that the present objectionable rule of the Judges as to a knowledge of the difference between right and wrong being the sound test was eliminated; it would then appear that the question of the murder and the state of mind might be taken together.

2419. (*Mr. Waddington.*) In law the question is as to the prisoner's state of mind at the time when he commits the act?—Yes.

2420. It is impossible in the present state of the law that these inquiries can be separated?—I think it quite impossible at the present time.

2421. (*Mr. Hardy.*) There is a very common delusion with people that they are watched, and have enemies following them, and conspirators against them. Supposing a man known to be under that delusion to commit a robbery and murder in the ordinary way, would you consider that he was responsible for that act, the robbery and murder being in no way connected with the delusion?—Having first discovered that he was really insane upon the one point, I would most unquestionably give him the benefit of the doubt as to whether he was not also insane in the act which he committed.

2422. If the punishment of death was abolished would you make any difference in his case, or would you sentence him to a heavy term of penal servitude, or whatever might be the substituted punishment?—Sentencing him to penal servitude would be of no consequence, because there he would be discovered to be insane, and I have no doubt that in every case a jury would at once convict him, knowing that that would

be the result. If the punishment of death was abolished the jury might convict in all those cases with great safety.

2423. (*Mr. Neate.*) Is not an increased vivacity of the moral sense, and especially of the religious sense, one of the symptoms of insanity?—No, I think not.

2424. Does not it often happen, for instance, that when the mind is breaking people talk much more about morality and religion than they did before?—No, I think not. There are some forms of religious mania where that would apply, but otherwise I think that it is rather the reverse, that there would be less religion. I should say that one of the distinctive marks of insanity is, in a heretofore religious man or woman, failing in or neglecting religious observances.

2425. (*Lord Stanley.*) May you not put it generally, that any material change in previous habits occurring without intelligible cause, is a circumstance creating a suspicion of morbid tendency?—Certainly.

2426. (*Mr. Neate.*) Is not there sometimes in the case of lunatics a very keen sense of right and wrong in judging of the actions of others, accompanied by a total want of the sense between right and wrong as to their own actions?—That is not at all unusual.

2427. They have a complete conviction that the most wrong actions which they can do are right?—Quite so.

2428. As to the influence of fear upon a madman, do you think that the prospect of a distant punishment affects him, or do you think that it is merely the fear of present punishment?—The question of the punishment of lunatics hardly comes within my province. I never punished a lunatic in my life, and never saw one punished.

2429. Would the following conversation be consistent with your experience. Dr. Forbes Winslow said to a lunatic, "If you were to "take a knife and cut my throat, what would it do?" He said, "It "would kill you." Dr. Forbes Winslow then said, "What would that "be?" The lunatic replied, "In the eyes of the law it would be "murder." Then Dr. Winslow asked him, "And what would be done "to you for it?" The man said, "I should have nothing done to me, "because I am a lunatic." Do you consider such an answer as that consistent with a state of mind which would require a man to be kept in confinement?—Certainly, I think that many monomaniacs, and many very insane persons, might have made the same answer.

2430. They would be properly subject to a restraint upon their liberty?—Yes.

2431. And they would be properly restrained by the Court of Chancery from the management of their property?—Unquestionably. A lunatic under my care wrote a book some time ago, and published it.

2432. (*Lord Advocate.*) You have said that insanity is a positive state; that is to say, that every man is either absolutely sane or absolutely insane?—That would demand a definition of insanity. I am defining insanity to be a positive state, supposing that insanity is not a disease.

2433. If that be so, is an insane man morally responsible for his actions; you seem to incline to think that he is not?—I think so.

2434. Then ought a man who is not morally responsible for his actions to be punished at all?—I should say, morally, certainly not.

2435. (*Lord Stanley.*) Do you think that there is any probability, or any reasonable possibility, of a man being tried, convicted, sentenced, and executed upon a capital charge, that man preserving the appearance of sanity, and yet being insane?—I have seen it myself. I saw a mono-

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maniac, with whom I conversed a few hours before ; I saw him tried and convicted, and he was executed shortly afterwards.

2436. And you have no doubt that that man was under an insane delusion ?—I do not think that anybody could possibly doubt it.

2437. (*Mr. Bright.*) What was his name ?—It was the case of a man of the name of Fooks, who was tried at Dorchester two years ago. The clergyman of the parish where he lived, the chaplain of the gaol, and myself, all of us took to the Home Office our representation as to the insanity of this man, and I do not think that it was doubted. I believe that he was hung on account of the distinctly strong ruling of the Judge that he did know right from wrong, and of my evidence, in which in reply to the question put to me by the counsel for the prosecution, "Does this man know right from wrong ?" I was obliged to answer that he did know right from wrong, because I heard him express his regret for the act which he had committed, and I heard him speak of it as a wrong act ; but at the same time the man was distinctly a monomaniac, subject to exacerbations of homicidal insanity, which was clear to me and others who heard the case.

2438. (*Mr. Waddington.*) Was that the case of a man who killed a warder in Portland prison ?—No, it was the case of a farmer in Dorsetshire, who shot his cousin under the delusion that he frequently annoyed him, and jeered at him, and that there was a conspiracy against him.

2439. (*Mr. Bright.*) Are there not cases of insanity such as Lord Stanley has referred to, which you would call paroxysmal ?—Yes.

2440. Have not you known cases of this kind where there is some abscess upon the brain, and where the state of mind during a portion of the year is perfectly calm and perfectly sensible, but where the abscess increases, and becomes excited to the point of suppuration madness increases with it, but after the suppuration the madness decreases, and the patient goes down to a state of perfect good sense and calmness for a considerable time, until the complaint returns ?—I do not quite adopt your pathology, but the fact is certain, that insanity constantly exists with long lucid intervals, and that it is more or less patent at different ttmes.

2441. And that the patient fluctuates in a condition between what may be termed sanity and insanity, the line between which is not easily definable. Yes ; that is a constant form of what we call insanity with lucid intervals, or insanity with remissions, or recurrent insanity.

2442. But with regard to this question the great difficulties of your profession would be mitigated or mainly removed if Capital Punishment was abolished ?—As far as the plea of insanity in criminal cases is concerned the difficulty would be entirely at an end, because the result would be that a criminal lunatic would be confined for life, and it would come to precisely the same thing, inasmuch as having committed murder he would be imprisoned for life.

2443. (*Chairman.*) Am I to understand you to say that if a man was mad upon one subject, and committed a murder wholly unconnected with the subject on which he was insane, and if the punishment of death was abolished you would wish him, if found guilty of that murder, to be sentenced to perpetual imprisonment ?—That is a question which would entirely depend upon the nature of the case. Supposing that he was a man with one delusion and had committed a murder, I should certainly always consider him a dangerous lunatic, and should wish him to be confined for life ; but if, as in cases of puerperal mania, the act arose from some physical cause which I had reason to think afterwards had passed away, I should think that the prisoner might be pardoned.

2444. But if the individual was confined for life would you wish him

to be imprisoned for life as a convict or confined as a criminal lunatic? —As a criminal lunatic, as a precautionary measure.

2445. (*Mr. Waddington.*) What you mean is that if he turned out to be a lunatic after his conviction he would be removed under the statute to a lunatic asylum, where he would remain for the rest of his life unless he recovered?—Yes.

2446. (*Mr. Ewart.*) If a man committed murder in a lucid interval would you have him punished capitally?—Most certainly, if it could be shown that it was in a lucid interval; but I apprehend that that would be almost impossible.

2447. And rather than run the risk of doing an act of injustice you would not subject him to Capital Punishment at all, even for a murder committed in a lucid interval?—Of course that must depend upon the crime. But the presumption would be that it was a part of the man's insanity.

2448. (*Lord Stanley.*) Putting those two facts together, namely, that the man was subject to insanity, and that no intelligible motive could be assigned for the act, you would think them a sufficient proof that the man was mad at the time?—I should think so. One of the objections which I have to the dictum of the Judges is, the effect which seems to have been produced upon the mind of the Home Office, which is the present court of appeal. Sir George Grey, in his evidence before this Commission, stated that in the case of Celestina Sommers, who had been spared on the ground of lunacy, and who was clearly a lunatic, and who died a lunatic, he had still great doubts whether that sentence ought to have been commuted, because he thought that she knew right from wrong. This woman had killed her own child of 10 years old.

2449. (*Mr. Waddington.*) Sir George Grey's difficulty arose from his being bound to take the dictum of the Judges, as representing the law of the land?—Yes.

2450. (*Mr. Bright.*) There has been a case which has lately excited remark, that of a young man of the name of Townley, were you concerned in that case?—I was.

2451. He appears perfectly well to have known that the act was an act of murder, and was punishable by the law with death; but he has always denied that he was guilty of any crime in the eye of God, of any moral offence?—Quite so.

2452. How do you explain that case?—I have paid great attention to the evidence in the case of Townley; I was in Court during the whole time, and I was in consultation with counsel each day; and I am distinctly of opinion that the conviction of Townley was right, and that he was not of unsound mind. I think also that the Home Office and the Judge likewise, as far as I can see, acted perfectly rightly in the matter in considering the medical evidence. The medical evidence was simply a mistake. Dr. Winslow started the very point to which allusion has been made; he stated that the result of his examination was that Townley was under the influence of the delusion that there was a conspiracy against him. The Judge in summing up stated that here was an instance of one distinct delusion, and I think that under those circumstances there was nothing for it but to ask for a fresh inquiry. I think that that case is one of those mistakes which might occur under any system of administration of justice.

2453. But looking to the subsequent career of Townley, and to what is known of the opinions which he has afterwards expressed, and to the manner in which his life terminated, do you still adhere to the view that his was not a case where it would be much better that Capital

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Punishment should not be practised?—Am I to understand your question to mean whether Townley was insane at the time he died?—

2454. That is not my question. Looking to his subsequent life and to the manner of his death, would you not now, reviewing the whole circumstances, place him in the list of those criminals on whom the punishment of death should not be inflicted?—That is the whole question; and it is a question which I cannot answer, because I do not know how far the punishment of death is deterrent to others. If the punishment of death is deterrent, I am sorry that Townley was not hanged. But it is a doubtful matter, and I really cannot answer the question. I have not gone into it at all. I believe Townley to have been of sound mind.

2455. The public have come to the opinion that doctors differ very much on this question as on others. Do you think that there is any probability of their ever coming to an agreement on a question of such difficulty as the degree of insanity, or whether in particular cases there is insanity or not?—I am afraid that the present system of hiring medical men on two different sides of a question will always prevent their coming to any agreement. But I beg to point out that, if the medical men disagree, the Judges upon this particular question disagree still more; and I can give six or eight cases consecutively in which Lord Kenyon, Lord Campbell, Mr. Baron Parke, Mr. Justice Williams, and half a dozen others, summed up to the jury in exact contradiction to each other; and Mr. Baron Alderson, commenting upon the execution of Bowler, observed that that was a most barbarous proceeding; therefore as regards doctors differing it is a case of such great difficulty that they must differ.

2456. If the doctors differ, and if the Judges differ, would not the difficulty of these differences be greatly removed if the law substituted some other punishment for that of death?—Quite so; rather than let the law remain as it is at present, when I am convinced that errors are constantly made, and that men who ought not to be hanged are hanged, I should certainly think that the law had better be altered. It would be much better that some few should escape who are sane than that these unhappy lunatics should be hanged, as they are now, merely as a matter of chance. It is purely a question of drawing a lottery ticket—it is merely an accident whether a man is hanged or not, according to the present ruling.

2457. (*Mr. Waddington.*) I believe that the knowledge of right and wrong is by no means uncommon among persons who are decidedly insane?—It is the normal state for them to have such knowledge.

2458. (*Lord Advocate.*) I suppose that in lunatic asylums you find a consciousness between right and wrong; that is to say, obedience to the rules which you lay down?—Except in cases of absolute idiotcy or dementia, the knowledge of right and wrong is intact.

2459. In an asylum do you punish a breach of the regulations?—If a patient of mine committed some breach of the regulations it would not be a question with me whether he did it wilfully. Of course it would not be a question of punishment at all.

2460. (*Mr. Waddington.*) He might commit a most malicious act without in your opinion being properly subject to punishment for it?—Certainly; it would be impossible to punish him.

2461. (*Mr. Neate.*) Do you believe that Townley really thought himself justified in killing the young woman whom he did kill?—I do not for one moment.

2462. You do not believe his statement?—I do not believe one word of it.

2463. If he had really thought himself entitled to do it should you have considered him a sane man?—I should have thought that he had arrived at that conclusion by a bad process of reasoning, but it would not have proved his insanity any more than in the case of a man who believes in ghosts.

2464. There may be many sane men who think themselves justified in killing those who have done them an injury, may there not?—I think that there are many men who would not hesitate to do it who are perfectly sane. I think that Townley killed the young lady from ordinary motives. I do not think that it was so much upon a process of bad reasoning as that he killed her first and made the reasoning afterwards.

2465. (*Lord Stanley.*) You would have judged quite differently of that case if the act of murder had been one without a motive?—Quite so.

2466. (*Mr. Ewart.*) Where the question of sanity or insanity arose upon the trial, would you refer that question to experts?—I think that the French plan is the better one; experts are sent down by the Government, and then they are heard as ordinary witnesses and examined by the counsel on both sides. It seems to me that that is the proper course to adopt, so as to prevent the medical men appearing as advocates on one side or the other.

2467. Would not the medical men still, in some cases, differ as to the sanity or insanity of individuals, even supposing that the change which you suggest was made?—The medical men might differ, but I think that the Judge and jury would generally get as sound an opinion from them as they do now in commissions of lunacy. The verdicts of the juries are generally correct enough, although medical men may differ, six on one side and six on the other.

2468. (*Mr. Waddington.*) Do you hold the opinion that there is a sort of homicidal tendency which is insensible, and which of itself would amount to insanity, so as not to render a man responsible to the law?—I think that the definition of "homicidal tendency" is not fully understood. "Homicidal tendency" has been defined by writers upon the subject to be a partial insanity, with a homicidal impulse. There have been cases of homicidal mania where impulse has existed without the other symptoms,—but that has been associated with lesionary symptoms,—it has, for instance, occurred to parturient women, or men drinking to madness,—homicidal impulse is very rare; but I believe that it may happen.

2469. (*Lord Stanley.*) Have there not been cases of homicidal impulse so wholly unconnected with any motive that the persons to whom it has occurred have been known to give warning to those whom they were about to attack?—Yes; I have recently seen a man held by three men, he begging and imploring them to allow him to kill me, and at the same time thanking me for being restrained from doing it,—that was homicidal impulse arising in a lunatic.

2470. (*Mr. Bright.*) Has your attention been called to some cases of murder, where the instant the murder has been committed the man has attempted to destroy himself,—for instance, a man has killed one or two of his children and has attempted to cut his own throat, or has killed his sweetheart, or his wife, and has then attempted to cut his own throat. What do you say that that attempt at self-destruction indicates?—That again must depend upon the particular nature of the case. Suicide is sometimes an indication of lunacy, and sometimes not; it would entirely depend upon the individual case.

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2471. If a coroner's jury sat on a suicide of that kind, the verdict in most cases would be one of suicide from insanity?—Quite so.

2472. But yet if the man did not happen to kill himself, he might be tried for the murder of the person whom he had killed, and would probably be convicted and hanged?—Exactly so. That would show the merciful feeling of the coroner's jury. That very thing occurred in the instance of the man in Dorsetshire, he shot himself immediately after shooting his cousin, and his life was saved with great difficulty,—and after an illness of five or six months he was convicted and hanged. I confess that in that special instance I did not see that the attempt at suicide made much difference, as it seems to be so common.

2473. If Townley the moment that he had killed Miss Godwin had with the same knife killed himself, what would have been the inevitable conclusion of your mind with regard to his condition?—The conclusion would have been precisely the same; in fact, it was a natural sequence of the first act. I am surprised that he did not do it.

2474. Would you not have said that both murders, that of the young lady and that of himself, were the result of an uncontrollable impulse at the time,—uncontrollable, say, from ungovernable passion?—There is a great difference between "uncontrollable" and "uncontrolled,"—it was uncontrolled passion. He wrote most sensible and moving letters to this young lady to meet him, and he went down with three knives in his pocket, and with one of these he killed her. I cannot think that that case ought to come under the category of uncontrollable impulse,—it may have been so.

2475. (*Lord Advocate.*) I suppose that neither homicide nor suicide implies insanity; but that a sane man may commit both of them?—Quite so.

2476. And that juries very often find verdicts of insanity from motives of benevolence?—Yes; I think that that is very generally the case.

2477. At the same time is not the suicidal tendency a most frequent one?—Yes.

2478. (*Mr. Waddington.*) As I understand you, you would not listen to the plea of uncontrollable impulse in a man who was sane, but you would require independent evidence of his insanity?—Yes; except in the case which Lord Stanley has mentioned, where a man without any possible motive kills somebody near and dear to him. I should be rather inclined to give him the benefit of the doubt.

2479. That would be evidence of insanity from the peculiar nature of the act itself?—Yes.

2480. (*Mr. Ewart.*) Is the number of criminal lunatics in your opinion increasing or diminishing in this country?—The ruling of the Judges latterly has been almost invariably for Capital Punishment, and I should think that from that cause the number must be diminishing; but I am not able statistically to answer the question. From the last return I find that out of 691 persons committed and put on their trial for murder, no less than 80 were acquitted on the ground of insanity, so that in the last seven years there must have been 80 convicts found to be insane.

2481. (*Lord Stanley.*) In the event of penal detention for life being substituted for Capital Punishment in cases of murder, do you think that it would be possible to enforce penal discipline for the whole period of a man's life, or even for a period of 15 or 20 years, without impairing his sanity? I mean by penal discipline such discipline as is observed on public works where convicts are kept to labour, or in prisons where they are detained previously to being sent to public works?—That goes

to the root of the whole question. I think that the punishment of a sane man confined for life as a criminal lunatic is worse than being hanged.

2482. (*Chairman.*) How long do you think that a person could be imprisoned in Pentonville?—It would depend of course entirely upon the idiosyncrasy and temperament of the man; but I think that a sane man who had committed a murder would most probably become insane if he was hopelessly confined as a criminal lunatic for the rest of his life.

2483. (*Lord Stanley.*) You are aware that it has been proposed to substitute for death in cases of murder perpetual detention in a prison, subject to penal discipline, from which the prisoner would never be relieved. From your experience in dealing with cases of insanity do you think that such a punishment as that is could be continued for the whole period of a man's life or even for 12 or 15 years without, in a majority of cases, driving him mad?—I think that the man, being sane, and having committed a capital crime, he would probably become insane in a very short time; the crime, the situation, the hopelessness of the position, and the whole thing would have that tendency. I think that the only chance of a man living would be from the consciousness of innocence or the hope of some change.

2484. (*Mr. Bright.*) Would not that entirely depend upon the particular circumstances of his punishment; if he was moderately kept, and had moderate labour, and was not treated with absolute torture, would not he reconcile himself to it, as men do to all kinds of misfortune, and live on as long as his health would last?—I understand the question to be as to a man who had committed a crime, and was then confined. I believe that the state of mind of a sane murderer who was sentenced to a life-long imprisonment as a lunatic would be a most painful prolonged torture.

2485. Then you think that it would be the effects rather of remorse than of the punishment which would drive him mad?—No, it would be the punishment also; I think that he would be more likely to go mad than to repent under that punishment.

2486. (*Lord Advocate.*) Have you known cases of madness produced by confinement?—I have not known them personally, but such cases are constantly met with, especially under the silent system of Pentonville they are on record.

2487. (*Chairman.*) Are you aware of the extreme limit of time for which a prisoner can now be detained at Pentonville?—I think that it was originally two years, and I fancy that they have reduced it still more.

2488. (*Mr. Waddington.*) One year is the maximum?—Yes.

2489. (*Chairman.*) You are probably aware that it was reduced in consequence of its being found impossible to keep the prisoners a longer time, and for them to retain their senses?—I believe that the representation of the medical men produced that change.

2490. (*Mr. Waddington.*) There would of course, in your opinion, be a very great difference whether a man was kept in separate confinement, or whether he was working in a gang with other convicts?—Of course that might make a great difference, but it is very difficult to answer that question without bringing your own feelings to work and to bear upon it rather than any scientific knowledge.

2491. Are you not aware that at Dartmoor and Portland a great many convicts have been kept upon public works without any perceptible effect on their minds?—Yes; as to the effect of penal servitude, there are a certain set of natures upon which penal servitude for life

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would have no deterring effect whatever; they would not go mad, but they would work like horses in a mill till death came to them; that is quite possible to be conceived. I do not mean to say that everybody at the end of 15, or 20, or 30 years would become insane, but I mean to say that in many cases it would be the most severe and frightful punishment which could be inflicted upon them.

2492. (*Lord Stanley.*) As far as the punishment upon the individual was concerned, would it not, in your opinion, be in many cases more severe than death?—In many cases far more severe.

2493. (*Mr. Ewart.*) I suppose that where solitary confinement was found too severe upon individuals, the medical authorities of the gaol would recommend some change?—I do not know that they would have the power to do that; they might recommend it to the magistrates.

2494. Is not that indispensable, as otherwise the men would go mad?—I do not know what the practical working of that would be.

2495. (*Chairman.*) Is there any other point to which you wish to advert?—The only particular point in my evidence which I wish to impress upon the Commission, would be the importance of having experts appointed by the Court in cases of alleged lunacy.

2496. And not as partizans?—Not as partizans; I think that there is the mistake.

2496*a*. (*Lord Stanley.*) You think that it is hardly creditable to the medical profession that upon every occasion two of the most eminent authorities who can be found should be brought forward, one, as far as the facts allow, directly to contradict the evidence of the other?—Yes; medical advocacy thus becomes a trade.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Saturday, 4th March 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

J. H. Parry, Esq.

JOHN HUMFFREYS PARRY, Serjeant at Law with a Patent of Precedence, examined.

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2497. (*Chairman.*) How long have you been at the Bar?—I was called to the Bar in 1843, and until 1856, for 13 years, I had a very extensive practice in the criminal courts in London and Middlesex, and at the assizes; since then also I have been engaged in a great many important criminal trials, and I have always taken the greatest interest in the administration of our criminal law.

2498. Will you favour the Commission with your views generally on the subject of Capital Punishment?—I am strongly opposed to Capital Punishment, first on the ground that a Government coolly

and without passion taking away the life of a human being sets a bad example, and weakens that sense of the sacredness of human life which I believe to be a great social safeguard. I also think that the punishment of death renders the operation of our Criminal Law, the conviction and the punishment of criminals, uncertain. The objection has been urged by everybody, and, of course, it is the first objection which strikes the mind, that the punishment is irrevocable and irremediable, and I do not think that any human tribunal should place itself in a position of being incapable, even at the last moment, of doing justice to an innocent man. I also object to Capital Punishment upon this ground, that it is opposed to the religious views of a very large portion of the community, who necessarily are members of juries, and who have so great a repugnance to Capital Punishment that they will seize hold of almost any element of doubt which they can, in order not to arrive at a verdict of guilty in cases of murder.

2499. In your experience have you found many cases in which juries are unwilling to convict on the capital charge for fear of the consequences of their verdict?—Numerous cases. Personally I have been engaged in several, but as the jury have found those persons not guilty, I do not think that it is for me to mention their names to this Commission; many of them are still living. But it is a common observation in our profession that there is nothing more difficult than to obtain a verdict of guilty from a jury in a case of circumstantial evidence where the charge is murder. As I have said before, juries seize hold of every opportunity, however slight, to prevent a violation of their conscientious feeling against Capital Punishment. It has frequently occurred, that a jury have said to a Judge, "Can we find a verdict of manslaughter "in this case?" The Judge has said, "No, you cannot." And rather than find a verdict of guilty of murder, the punishment of which would be death, they have acquitted the prisoner altogether, and let him go free, although in their own minds they must have been satisfied that he was a criminal, but not to a high degree, or at all events not to the degree which they thought amounted to murder.

2500. (*Mr. Waddington.*) Have you known many cases where that has actually passed between the jury and the Judge?—I could not give you the names of the cases, but upon certainly two or three occasions I have known it pass, and I have also read it in reference to trials of which I have no personal knowledge. I also wish to state that I do not believe that the punishment of death, as inflicted now, is so deterrent as is generally supposed. It is said, and has been said before this Commission by persons of great experience, that murder would have been committed but for the fear of Capital Punishment. For example, Mr. Tanner, a most intelligent police officer, whom I know well, said that he believed that in a particular case a man would have murdered him, and would also have murdered a servant girl in the house where he had committed a burglary, but for the fear of the punishment of death. I do not agree with that. I do not believe that the criminal classes, as a rule, are guilty of murder. The great majority of murders which are committed are committed by persons who were never criminal before, or certainly never known to be, and who, undoubtedly, have not been educated in crime, which thousands are in this country, and which I presume is the meaning of what is called the criminal class.

2501. (*Chairman.*) Are you aware that one suggestion, in answer to what you have now stated, namely, that the convict class is not the class from which murderers come is, that the reason of that is, because they are deterred from committing murder by the fear of being executed;

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you do not agree with that?—I do not concur in it; I do not believe that that is the case. I believe that murder does not enter into their calculation. I would take an instance. I have no doubt whatever that, in the case of the gang of burglars who effected the robbery the other day at Mr. Walker's, which has been so much talked about, a single policeman and a single bull's-eye would have immediately dispersed them. I do not believe that these persons start with the intention of committing murder, and I do not believe that it enters at all into their calculation whether the punishment for murder is capital or not. I believe that they are professional criminals who go to work quietly with skill and judgment, and who have all the means and appliances of crime, except the intention of committing murder, which they never contemplate. It is a question whether the natural instinct against taking away a man's life is not quite as strong a deterrent as the fear of Capital Punishment.

2502. (*Mr. Waddington.*) Are you aware whether burglaries of that description have much increased since the time when they were capital, and when Capital Punishment was carried out?—I should think not; but I cannot answer that question from statistical knowledge; I have not applied my mind lately to it. I fancy that burglaries have rather diminished, except such scientific burglaries as those which have lately been practised in the City, and in other large towns.

2503. Have you reason to believe that burglaries with violence, which were formerly generally capitally punished, have not increased since Capital Punishment was taken away?—I think not; I think that they have decreased. The last case that I know of on my circuit was the Frimley murder, in which the Reverend Mr. Hollest was murdered.

2504. I remember the time when a burglary with violence not attended with the death of the inmate was punished with death; since that was the case have such burglaries in your judgment increased or not?—In my belief they have decreased, but it is a mere belief. I cannot pledge myself to it. I do not think that burglaries are so numerous as they used to be.

2505. (*Mr. Neate.*) Is it not the result of your experience and observation that at the time when burglary and highway robbery were capital offences, the alternative intention of committing a murder in case of resistance was much more frequent in the mind of the burglar and housebreaker than now?—Is might be so, because he had nothing to care for when he committed a murder; he knew that the punishment of death would follow the burglary just as much as it would follow the murder, and, therefore, he became reckless and had nothing to care about. Still I do not think it was a matter of calculation beforehand. I myself believe that burglaries with violence have very much diminished since the abolition of Capital Punishment for that offence.

2506. (*Chairman.*) You state that you are in favour of the abolition of Capital Punishment; have you considered what you would substitute for it?—Before answering that question, I would wish further to illustrate an observation I have previously made, namely, that the criminal classes are not murderers. Take such a man as Palmer, for example; he, no doubt, was a murderer of the very worst kind; that man was comparatively an educated man; he probably fell into one crime after another, on account of the success with which he had practised the first. Take the wretched man Müller, who was executed the other day for murder, and whom I defended; there is no doubt that his offence, under any definition of the law of murder, would be considered murder of the highest degree. I think that myself; but he was one of the most in-

offensive and harmless persons imaginable, and he received a character of that sort from everyone who knew him; it was a sudden act of crime; and I believe that when he perpetrated it, the idea of Capital Punishment never entered his mind. Since I had the honour to be requested by this Commission to come here, I have looked over a great number of cases which have occurred throughout the whole of our criminal jurisprudence, and I find that the majority of murderers are persons who do not belong to the criminal classes, and who either commit the crime of murder secretly and after premeditation, believing that they shall never be found out, or who in a sudden moment of passion kill another person, which in my opinion ought not to be considered murder in the highest degree.

2507. Assuming that Capital Punishment is retained, or whether it be retained or not, would you draw any distinction between the different descriptions of the crime of murder?—I have much reflected upon that subject, and wish to call the attention of the Commission to it. I consider that the definition of the crime of murder by our English law is very unsatisfactory. All the law relating to murder is the common law of England, and what is sometimes called Judge-made law; and the Judges, in defining the different cases in which the crime of murder shall be said to have been perpetrated, have taken from the juries what I think ought to be the pure province of the juries, and that is the question of malice. They have laid down certain rules, founded, no doubt, upon principle, and no doubt laid down by men of very able and comprehensive minds, but they have laid down certain rules by which malice becomes a presumption of law instead of a question of fact. For example, take such a case as this:—An officer of justice, say, a constable or a sheriff's officer, having in his possession what he believes to be a legal document, and believing himself to be legally authorized, arrests a man either for a debt or for a crime; the man refuses to be arrested, and a struggle ensues and the officer is killed; whether that is murder by the law of England or manslaughter depends upon what I consider to be an irrelevant question in reference to the crime of murder, and in reference to the fact of the man killing the person with whom he was struggling, namely, whether the warrant was properly signed, and whether the warrant was legal and formal,—in fact, whether it was a genuine legal instrument or not. If it was a genuine legal instrument, then the law of England says that is murder; if it was not a genuine legal instrument, then the law of England says that it is manslaughter; that I consider to be most unsatisfactory.

2508. (*Mr. Bright.*) There being not the slightest difference in the conduct, or the opinion, or the intention, or the guilt of the man who commits the crime?—Not the slightest, because the man there is equally criminal, and most likely ignorant whether the warrant is legal or illegal. The law steps in, and says, "We consider this to be murder, "and we do it for the protection of officers employed in the execution "of the law." But I believe that the officers would be quite as well protected without treating such an offence as murder. But any way, as regards the real merits of the case, a man of common sense cannot see the slightest distinction between the execution of an illegal warrant and of a legal warrant so as to increase the character of the crime which may be committed by the party who is arrested from manslaughter to murder.

2509. (*Mr. Waddington.*) What is exactly the question which you think ought to be left to the jury in such a case; should it be whether the party believed it to be a legal document?—I would not leave any question to the jury about the legality of the warrant.

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2510. You think that it should be no greater offence to kill an officer of justice in the execution of his duty than to kill a person who pretended to be an officer of justice?—I do not say that; I say that it should not be murder. I can understand the policy of the law, and the principle upon which it is arrived at; it is for the protection of the officers of justice, and also for the protection of the subjects of the Queen, who ought not to be arrested upon illegal warrants.

2511. Then you do not wish it to be understood that the offence ought to be the same in the case of a person who was pretending to be an officer of justice, and who was arresting a man without any colour of law at all, and in the case of an officer of justice who was strictly doing his duty?—Certainly not.

2512. Still the law must provide for them?—Yes, I concur in that; but I do not consider that to be murder in any sense. As regards the definitions of murder, duelling is murder by the law of England; it is clearly decided to be so. I do not remember but one instance in which the law has ever been carried into execution, and that was an instance, the exact date of which I have not, because I have not been able to refer to the book, having been on circuit; but there is the instance of a Major Campbell who fought and killed an officer in the regency of George the Fourth, and great efforts were made to save him, but he was hanged; and he was hanged on the ground that the officer, while dying, was asked by the Major, "Has everything been fair?" "Campbell you have hurried me; you are a bad man." That is the only execution for duelling that I know of.

2513. (*Mr. Neate.*) Had not the antagonist been forced into the duel?—Yes. The dispute was to the last degree contemptible. It was about some military regulation; and this Major Campbell no doubt forced the other officer into the duel, and they fought, I believe, in a private room at seven paces. That is the only instance which I know of. The Commissioners remember, of course, the case of Fawcet and Monroe. In that case Monroe, I believe, only had 12 months imprisonment.

2514. (*Chairman.*) Sentence of death was recorded?—Yes; and it was commuted to 12 months imprisonment. I remember defending a Frenchman at Kingston, in a case in which a man of the name of Bartelemi was engaged. Mr. Justice Coleridge, who is a member of this Commission, presided; and I said to the jury, "You are as well able "to judge what is murder as any of the Judges of the land;" and they thought so, and they found him guilty of manslaughter, and the comparatively mild sentence of six months imprisonment was passed. Duelling is not likely to occur amongst us now, but the law of duelling should be altered and more rationally defined.

2515. (*Mr. Waddington.*) It has been altered by common sense?—Yes. In order to show how capricious the definitions of murder in our law are, I will take the case of two persons sincerely agreeing to commit suicide, both of them wishing to get rid of their lives, one of whom, by the merest accident, by taking an overdose, say, of oxalic acid, does not die; and I mention that because it is within my own experience. I defended a man under those circumstances. He and a woman with whom he lived in wretchedness and misery agreed to commit suicide. They wandered about London all night; they had not the courage to throw themselves over London Bridge which they originally intended, but they went into a room and into bed together, and took a dose of oxalic acid. The man took an overdose, and he vomited it up; he lived and the woman died. That case was tried before the late Mr. Justice Patteson; it was early in my career at the Bar, in 1845 or 1846; and although the Judge directed the jury that it was nothing but murder by

the law, they acquitted the man simply upon the ground which I put before them, namely, that they knew what was murder as well as the Judge. I see by some of the foreign documents that if a man by perjury obtains the conviction of another, who is executed, that is murder. By the English law that is not murder, and has been so decided. But I think that it is murder in France and in Austria.

2516. (*Mr. Neate.*) When was it so decided in England ?—The case is in Foster's Criminal Law, the case of the King v. McDaniel. I think that it was during the period of George the Second's reign, when there was a 40*l.* reward for the conviction of footpads, and nothing was more common than to charge a person wrongfully with that offence merely to get the reward, and witnesses were always coming forward; and this happened at each session of the Old Bailey, and if you read the old criminal records of the Court at that time you will find it so. I have reflected much about the definition of the crime of murder of the higher and of a lesser degree, but I think that it is almost impossible to establish it. My idea of a murder is a prepared, planned, and deliberate murder, prepared and planned beforehand. I reject any definition of murder which would include a man in a sudden burst of passion killing another. I say that this is not, and ought not to be, murder,—but it is murder by the law of England.

2517. (*Chairman.*) Then you would so far alter the present definition of the law of murder as to take these cases out of it ?—Yes. I would leave the question of malice to the jury. I consider, as I have already said, that the Judges have rather usurped the province of the jury; and there is a historical instance in which they had to be checked by Act of Parliament, namely, with reference to the law of libel in the time of Lord Mansfield and Mr. Justice Buller, two probably of the most eminent Judges we have ever possessed. They strove by the decisions of the Court of Queen's Bench to retain the old law, that the jury had nothing to say upon the trial of a libel, but whether it was published, and what was the meaning of the innendos, as in the Dean of St. Asaph's case. Mr. Erskine's celebrated efforts in opposition to this ruling of the Judges were eventually carried out by Mr. Fox's Libel Act, by which the Judge may tell the jury what is his opinion if he pleases, but it is for the jury to say whether the publication is libellous. If I remember aright, Lord Denman never did deliver his opinion; Lord Ellenborough always did. Lord Denman's is the practice which now prevails.

2518. (*Mr. Waddington.*) Even now in a civil action the Court would decide upon demurrer whether a certain publication was libellous as a matter of law or not, so that the law has not been altered in that respect, but only the trial ?—Yes; if an innocent document was put forth upon the declaration, the defendant would say that that was no libel, and would demur to it in law.

2519. Is not that rather different from the general law ?—I look at the malice in a man's mind at the time when he commits murder as being a simple question of fact, and which cannot be tried by any legal rules, just as the defamatory character of a writing is rather a question of fact than of law.

2520. You would confine it to express malice; you would get rid altogether of the law which implies as a necessary presumption malice from certain acts ?—Certainly. I speak with the greatest possible respect to the Judges, but I think that it is an usurpation of the province of the jury.

2521. (*Mr. Neate.*) Do you think that where the Judge sometimes, in answer to the jury when they ask him whether they may find manslaughter, says, "You may not find manslaughter," that is an undue

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exercise of judicial authority ?—I think that it is undue in this sense. No doubt, according to the present rules of law, a Judge may fairly say that, but I think that he should not be allowed to say it, and that the jury should decide whether the case is one of murder or of manslaughter.

2522. Do you not think that the jury sometimes misunderstand his answer, and understand that they may not find a verdict of manslaughter? —Perhaps they do.

2523. The answer of the Judge in your opinion ought to be, "If you "believe these facts it is murder in my opinion, but if in defiance of "my opinion you choose to find a verdict of manslaughter, I am bound "to take it," but the jury do not understand that ?—No, I do not think the judge should so direct a jury ; I have known the Judge telling them in the most peremptory way, "Gentlemen, this is murder, or "nothing, and you must convict the prisoner of murder, or you must "acquit him altogether, and I tell you that that is the law." I think that the Judge ought not to have the power of saying that.

2524. Is not that a misdirection according to the present law ?—No, I think not.

2525. How can the Judge say to the jury, "You must either find a "verdict of murder, or you must acquit the prisoner," when they can legally find a verdict of manslaughter ? He uses the word "must" for "ought," and misleads the jury ?—In point of fact, as the law now stands, a Judge is justified in so telling the jury. I will call your attention to the charge of Mr. Baron Martin in the recent case of Polezzioni. Mr. Baron Martin made use of this remarkable expression in summing up that case to the jury. I was very much struck with it. I read it in the paper. He said, "I have been considering whether "I could concientiously leave this case to you as one of manslaughter, "and I feel that I cannot ; and if you believe the facts, the prisoner "is guilty of murder." That means that Mr. Baron Martin had been searching in his mind, no doubt with the utmost conscientiousness, to see whether by the law of England, as laid down by the Judges, he was justified in directing the lesser offence to be found by the jury ; and that case shows the inadequacy, and I think the capriciousness of the definition of murder by our law. That man Polezzioni was not, *in foro conscientiæ*, guilty of murder.

2526. (*Mr. Waddington.*)—Mr. Baron Martin felt himself bound by the previous decisions to tell the jury that they must imply malice aforethought, so as not to reduce the offence to manslaughter ?—Yes. He held that if Polezzioni had been struck by this man with a stick or treated with violence, and had then used a knife which he had about him, it might have been manslaughter ; but Mr. Baron Martin said, that because no weapon had been used against him ; because he had not been assailed or beaten in any way, he was guilty of murder. If the man had been struck on the head, human infirmity would have been taken into account, and it would have been regarded as a secondary offence.

2527. (*Chairman.*) Then you would wish the law to be so far altered as to take the case which you have now alluded to out of the definition of murder and put it within the definition of manslaughter?—Yes, or murder with extenuating circumstances.

2528. Either murder in the second degree or manslaughter ?—Yes.

2529. That would be simply a question of terms ?—Yes, that is a mere matter of definition.

2530. (*Lord Stanley.*) Do you see any advantage in distinguishing between what you call murder in the second degree and manslaughter ?

—No; I have no objection at all to the old English term "manslaughter."

2531. (*Chairman.*) It has been suggested that if you retain Capital Punishment for murder, the expression "murder" shall only be made use of where the intention is that the man shall be hanged, and that you shall not call this or that murder in the first degree or murder in the second degree; is that your view?—I find it very difficult to define murder in the second degree. I see that Mr. Justice Willes states he has attempted to do so and failed; I am sure therefore I am not likely to succeed. I hardly know whether using the words "prepared," or "planned," or "premeditated" would meet the point. The old English term "of his malice aforethought," is a very good and cogent expression.

2532. (*Mr. Neate.*) When you say that you would confine murder to cases of a deliberate intention to kill, would you admit in that a conditional intention. I may go with a pistol and ask a man for his money with the deliberate intention of killing him in case he should refuse?—In my opinion that is murder of the highest degree. In the case of the Frimley murder, the murderer went with a pistol loaded with marbles, not with bullets, but no doubt intending to kill, and he did kill.

2533. (*Mr. Hardy.*) Have you looked at the Indian code?—No.

2534. (*Mr. Waddington.*) Is not the real difficulty in the definition of the word "deliberate," how long before the act the intention is to be taken as having existed?—That I feel, and that I think ought to be for the jury; that is why I object to the Judge interfering. I say that it is a mistake, and that the jury ought to have the power at large to deal with a man charged with the crime of murder, and that if they conscientiously think that there are mitigating circumstances in the case, they ought to be enabled to find a verdict to that effect; whether as a verdict of manslaughter, or as a verdict of murder with extenuating circumstances, would be a mere matter of formal arrangement, and would not at all affect the principle; but I object to a Judge having it in his power peremptorily to tell a jury, "This is murder by the law of "England, and nothing else."

2535. I was supposing that to be altered, and that we were to have a new definition of the particular murder which was to be punished capitally?—I would leave the question of malice generally to the jury.

2536. By the present law it is considered to be malice aforethought if the intent to kill springs up at the moment before the act?—That I think is erroneous.

2537. Would not there be an extreme difficulty in defining the length of time before the act during which the intent should exist?—Yes; no doubt that has been the difficulty felt in laying down the principle in saying 10 minutes or half an hour; one man of an excitable temperament might not cool in an hour, and another might cool in five minutes. I think that the punishment of death, if retained, should only be retained for murder in the highest degree, by which I understand a planned murder from some wicked or sordid motive. There is an infinite variety of degrees in the crime of killing a man; the offence of killing a man is sometimes punishable in our law by a fine of a shilling, and sometimes, as we know, by Capital Punishment. I would leave that to the jury, and I think that public opinion would be much more satisfied if the jury decided whether the case was murder or manslaughter, than if it was decided by the Judge.

2538. You would leave the whole trial to the jury?—I would.

2539. (*Mr. Neate.*) You think upon that part of the subject that the

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Judges have encroached on the province of the jury, as they did in the law of libel?—Yes.

2540. (*Mr. Waddington.*) What would you say to killing without premeditation, or intention to kill, in a highway robbery or a burglary?—I would leave that to the jury.

2541. Would you call it murder of the highest class, unless there was an actual intention to kill found by the jury?—There ought to be deliberate malice found by the jury.

2542. You would not infer the malice from the act?—No; I think that that is a mistake. The presumptions of law are not always presumptions which a jury would make. Take the case of a man of the name of White, whom I defended at the Lewes assizes in 1856 or 1857; that man had had a quarrel with his wife at breakfast; he was a most respectable man, foreman to Mr. Lee, the well-known contractor. I think that his wife had followed him out as he was going to his weekly employment, and had used some offensive language to him; a struggle took place, and he killed her. I had the greatest fear that a verdict of murder would be given in that case instead of manslaughter; but I overheard one of the most active men upon the jury turn round to his fellow juryman and say, "This is not murder," and upon that hint I spoke, and the man was acquitted of the murder; but Mr. Justice Wightman in sentencing him to transportation for life said, "The "jury, for what reason I cannot understand, have acquitted you of "the offence of murder,"—because he summed up to the jury that it was murder, and nothing but murder. Here then were two constituted authorities at variance, than which nothing in my judgment is worse. Counsel also are placed in a false position in appealing to a jury to take the matter in their own hands; but in cases of life and death they ought not to shrink from doing so.

2543. (*Mr. Neate.*) Where a man uses violence which is likely to produce death, and which does produce death, as, for instance, where a highwayman with a great bludgeon strikes a man on the head, and it is not clear whether he intends to stun him or to kill him, would you call that murder if death ensues?—I think so.

2544. (*Mr. Waddington.*) Would not you leave that to the jury?—Yes, but in my own mind, I should consider it as murder.

2545. You would let the Judge direct the jury in this way:—"Gentlemen, if you think that the prisoner had no intention to kill the "man, but merely to rob him, then it will be manslaughter, or murder "in the second class, but if you think that the prisoner had an intention to kill him, or to do him a grievous injury, it will be murder." You would leave that to the jury?—Yes; and then the Judge would do what he does upon every question of fact, he would say, "If you "believe the evidence do so and so, but it is for you to believe it, "and it is for you to believe that a guilty intention existed in the "mind of the man."

2546. According to the present law the Judge would leave no question, but would say, "The intention is perfectly immaterial, the deceased "having been killed in highway robbery," and that is what you object to?—Yes.

2547. (*Chairman.*) If the man went out to commit a highway robbery with loaded fire-arms, as I understand you, you would not leave that to the jury?—I should deal with it as a matter of fact. If a man goes out intending to commit a highway robbery, and is armed with a loaded pistol, which is a weapon of death, he must in all probability have in his mind that he intends to use that pistol if necessary. I should let

the jury consider that point, and if they really considered that his intention was to take life, it would be murder.

2548. You would still leave that to the jury?—Yes, and I am satisfied that, as regards the general public opinion upon this matter, the public trust more to the verdict of the jury than to the ruling of the Judge. There is a most unhappy instance, in which Mr. Justice Blackburn refused to let a man of the name of Wright withdraw his plea of "guilty." I know that that excited the greatest amount of irritation amongst the working classes, the fellow labourers of this man, and if that case had gone to the jury, and had been tried out, there is no doubt that they would have had more respect for the verdict of the jury than they had for the direction of the Judge.

2549. (*Mr. Neate.*) Did Wright formally express a desire to withdraw his plea?—No; if he had done that the Judge would not have refused it. The counsel for the prosecution suggested that it was a very serious offence, and I am almost satisfied that if the counsel for the prosecution, Mr. Sleigh, had defended the man, he would have been acquitted of murder; it was a sudden act.

2550. (*Mr. Waddington.*) That was a case in which the Judge would have left it to the jury, and would have said that if they believed the evidence, it was murder?—The evidence would mainly have arisen out of his own confession. He stated the facts—that the woman was insulting him, and (to use a domestic expression) nagging at him. She was lying in bed, and I believe he was or had been shaving, which on Saturday night is a custom of working men, so as not to have the trouble of shaving on Sunday morning, in order that they may have the whole Sunday clear, and in a sudden frenzy he attacked her and killed her.

2551. With a razor?—Yes.

2552. In your experience, would not almost all the Judges inform the jury that the use of such a weapon as a razor made it murder?—I believe that almost every Judge would do so. There is another definition of the law of murder which I object to, namely, that words do not constitute a sufficient aggravation for a deadly blow. I think that some words are much more poignant and pungent than any blow.

2553. Is not the practice of Judges somewhat different; do not some Judges leave the question of murder or manslaughter more at large to the jury than others?—I believe so. I believe that one of those Judges is Mr. Justice Willes; and I have noticed in his ruling that he takes a wise and enlarged view of the law, so as in some cases, to do away with the doctrine of implied malice.

2554. (*Mr. Hardy.*) Would you restore the former power which the Judges had of recording sentence of death?—I do not see the use of it, because my view is that the jury should have the power of saying whether sentence of death should be executed or not; I do not say finally; there should always be an appeal to the mercy of the Crown; that, of course, never can be abandoned; but in ordinary cases I say that the verdict of the jury would satisfy the public mind, and I would not leave it to the Judge. I would let the jury say at large whether the case is manslaughter or murder, or find mitigatory circumstances.

2555. (*Mr. Waddington.*) Are you quite sure that the verdict of the jury would always satisfy the public mind in those cases. Take the case of Smethurst, in which you were counsel; was there not a very great outcry against that verdict?—There was.

2556. (*Mr. Bright.*) Was not the outcry rather more against the charge of the Judge?—The conduct of the Judge was very much criticised by a portion of the press.

2557. (*Mr. Waddington.*) In charging the jury upon the facts, the

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Judge would undoubtedly express his view of the evidence?—You cannot have any tribunal with which everybody will be always satisfied. I am speaking relatively. I believe that the public mind would be more satisfied with the verdict of the jury than with allowing the Judges to have the power of recording sentence of death. Then I would say that the uncertainty of convictions is very great owing to Capital Punishment. It really hinders the administration of justice. Take the general instance which I have put, where the jury believe a man to be guilty of manslaughter, but are told that they must find him guilty of murder, and that they cannot find him guilty of manslaughter. Then the criminal escapes, although the jury are anxious to punish him, but not to the extent of taking away his life. I remember such a case which I defended at Chelmsford. A man was suddenly arrested by a policeman, and I believe there was very little doubt that he had been committing a crime. A struggle arose, and the policeman was killed, and in an apparently brutal manner. That man was acquitted.

2558. (*Mr. Neate.*) The jury were told that they must find murder, or nothing?—Yes. Mr. Justice Williams was the Judge.

2559. (*Chairman.*) Would you propose any alteration in the existing law with respect to infanticide?—Yes. Practically the law of infanticide hardly prevails. Almost always now juries find concealment of birth; and to show the general feeling against Capital Punishment, I also find that there is a great reluctance to hang women. Whether that has sprung from the fact of our being governed by a Queen, or not, I do not know. It is more prevalent in recent times than it used to be, and it may be that the Queen herself has some feeling upon the subject. That, of course, I do not know. A woman of the name of Hunt was charged with murdering an old friend who had treated her with hospitality and kindness, and robbing her, and no doubt it was a most cruel murder, and she was found guilty. She was pregnant at the time—I remember the case well because I saw for once in my life a jury of matrons empannelled to try whether she was pregnant or not. That case was tried at the Central Criminal Court. The old ladies had, according to custom, a glass of gin each and some bread and cheese, and examined the woman in gaol, and they declared her not to be pregnant. Medical men examined her, and found that she was pregnant, and she was ultimately delivered of a son. That is a case in which Capital Punishment would not be carried out. There is something repugnant in the idea of cosseting up a woman, and nursing her with every attention during her confinement until she recovers, and then hanging her; but why?—because of the repugnance to the punishment. There was no objection to the imprisonment of that woman.

2560. (*Mr. Bright.*) Therefore would it not follow that if a woman committed murder whilst she was in that condition, as a matter of absolute fact the punishment of death would be wholly set aside in her case, and would not be carried into execution; and any woman in that condition would commit a murder without the fear of Capital Punisment?—Clearly so; in my judgment no Home Secretary would carry out that sentence upon such a woman, as it would be so repugnant to the general feeling. There is the case of Celestina Summers, which I mention to show the indisposition which exists to carry out the punishment of death upon women. She murdered her child; it was a very bad case of murder, but in all probability she was insane, although not found so by the jury. But there was the case of a woman in the service of Mr. Furner, the County Court Judge of Brighton. Sir Edward Creasy, now Chief Justice of Ceylon, defended her, and I assisted him; it was a most cold-blooded murder; the woman wanted to get an emigration

ticket to Australia, but she could not go with children; the little girl was about six or seven years of age, and upon a Sunday she took her out into the fields near Hove and strangled her with a string, where she was found a few hours after she was dead. That woman's sentence was commuted; but why? That was as cold-blooded, cruel, and deliberate a murder as possible; it was for the purpose of getting her child out of the way, in order that she should get an emigration ticket. The cause of her reprieve must have been a repugnance to carry out the sentence of death upon a woman.

2561. (*Mr. Neate.*) Her own child? Her own child; an illegitimate child whom she had kept before. She took her from the place where she was living, and where I think she paid about 4*s.* or 5*s.* a week for her.

2562. (*Mr. Waddington.*) I believe that the usual motive for murdering illegitimate children is to get rid of them, so that the mothers may marry or get a place?—Yes. Upon the question of infanticide, practically the law is what I have stated. The findings of the juries are generally now "concealment of birth." There would, of course, be great reluctance to execute the punishment of death, in cases of child murder. The difficulty is in drawing any definition of murder which shall exclude the murder of a child; it must be done most arbitrarily. In one respect a child is the most helpless of creatures, and therefore the murder of a child should be much more carefully guarded against than any other murder; but we should never be allowed to inflict Capital Punishment upon a woman who strangled her child just as it came into the world. I notice that one of the gentlemen examined before the Commission has suggested a limit of three months. I think that that is too arbitrary a definition. I do not concur in it. I would leave the question of infanticide to the jury. I would not retain the punishment of death under any circumstances for a woman killing a new-born child. You might by Act of Parliament lay down the rule that a woman should not be guilty of murder in killing a new-born child; but when the child is a month or three months old, what definition can you lay down which should exclude the case from the principle of murder?

2563. (*Lord Stanley.*) Speaking of the case of murders committed by women in general, do you think that there is any difficulty in establishing a distinction between their case and that of men, as they are already treated differently from men as regards political rights and other such matters?—I myself think that there would be great difficulty in a definition which should exclude a woman from being guilty of the crime of murder. Practically I believe that women have ceased to be hanged in this country. There may be a case occasionally, such as that of Mrs. Manning.

2564. (*Mr. Waddington.*) And Catherine Wilson?—Yes. I ought to withdraw that remark. No doubt the case of Catherine Wilson was a very serious case of poisoning.

2565. (*Mr. Bright.*) Would you not be correct in saying that the tendency is in favour of the abolition of Capital Punishment for women?—Yes, there is a great indisposition to hang a woman in this country.

2566. (*Mr. Waddington.*) There was also a woman executed at Chester, about two years ago, for poisoning?—Yes.

2567. (*Mr. Bright.*) You recollect the case of Annette Meyers?—Yes, who shot a soldier. Her sentence was commuted, I think, to seven years' transportation.

2568. And you have mentioned the case of Celestina Summers?—Yes.

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2569. And you have mentioned the case at Lewes?—Yes.

2570. And you have in your mind other cases, which lead you to the conclusion that the sentence is not carried out with the same rigour upon women as upon men committing the same crime?—Exactly so; that is what I wish to say.

2571. That being so, is it not calculated to impair the public faith in the equal administration of the law?—Clearly so. It renders the administration of the law more a lottery, and, as regards the crime of murder, even in the highest degree, if a man does calculate as to what punishment he shall have, which I have no faith in, he also calculates what chances he has of getting off, and, under the law of Capital Punishment, there is no doubt his chances are very great, because it is within the knowledge of every man at the Bar that there are constant acquittals of great criminals, which would never otherwise take place, in consequence of the punishment of death. I know of several.

2572. With regard to the uncertainty in the infliction of the punishment, do not you find that criminals who have friends who can engage able counsel, who can get up a case well, who can create public interest and sympathy with the criminal, and who can bring all the facts, real and imaginary, to bear upon the Home Office after punishment is awarded by the law, have a much greater chance of escape than poor criminals isolated from friends, and having no such means to help them to a pardon. Have you ever observed that in your practice?—I believe that that is so at times no doubt, because sometimes the very poor class have no friends who understand how to go to work at all so as to create any influence in their favour.

2573. I am not assuming that either the Judges or the Home Secretary are influenced in the slightest degree by a consideration for rich persons over poor ones?—Certainly not.

2574. But with an equal intention to inflict this punishment, of course all means of that kind can be brought to bear more in favour of persons well off than in favour of persons who are poor?—No doubt a person who is well off in the world has, of course, more chances of escape from the consequences of crime; he has more power to put agencies into operation which may get either some mitigation of his sentence or a pardon.

2575. (*Mr. Waddington.*) Those advantages are possessed by such persons throughout the whole proceedings?—Yes; first-rate solicitors are employed; Sir FitzRoy Kelly is retained, as he was in the case of Tawell, and medical men of eminence are brought forward to give evidence.

2576. (*Mr. Neate.*) No man is ever allowed to be tried for his life without a counsel, is he?—I do not think that I ever knew of an instance in which the Judge would allow a man to be tried for his life without counsel; he always assigns him counsel; but the meaning of that is that he asks some barrister to watch the case on the spot, who reads the depositions or picks up the case from the opening of counsel, which is very unsatisfactory.

2577. (*Chairman.*) Was not that the case the other day when Polezzioni was tried?—Yes; but there I believe the counsel had been previously retained for him and afterwards was not, and I believe that the same counsel acted for him.

2578. (*Mr. Bright.*) In answering the questions which have been put to you with regard to altering the definition of murder, infanticide, and so on, are we to understand that these are things which you are recommending of yourself, or that you would prefer that Capital

Punishment should be absolutely abolished?—I would prefer that Capital Punishment should be absolutely abolished.

2579. And then you would suggest change?—I have directed my mind to the question, supposing Capital Punishment to be retained, then what would you do?

2580. Supposing it to be abolished, it might also be necessary to make distinct definitions different from those which we now have?—Certainly, but it would come to a question of secondary punishment.

2581. Would not all those difficulties which you have been stating so fairly, and which have, as you say, puzzled many of the Judges, and may be supposed to have puzzled you, be wonderfully diminished provided Capital Punishment was abolished?—I think so.

2582. You could grapple with them all much better if you had to deal only with what we call secondary punishment?—Yes. As regards the question of murder in the first degree, and murder in the second degree, retaining Capital Punishment for murder in the first degree, I have entered into that question simply because it is a matter which has been investigated by the Commission, but I believe that the abolition of Capital Punishment would wonderfully clear the way to the definition of murder in the first degree and murder in the second degree.

2583. (*Mr. Waddington.*) Are you aware that the definition of murder making the first-class capital, and making the punishment secondary in all other cases, has been largely adopted in the United States?—Yes, it has been adopted in Massachusetts.

2584. And it has been said to work remarkably well?—Yes.

2585. Leaving every murder in the first-class capital, and then saying that all other murders shall be in the second-class?—Yes. If some such definition could be arrived at, if the punishment of death is to be retained, I think that that system should be adopted. I cannot conceive that there is a fatal difficulty in the way.

2586. If Capital Punishment was retained, you would strongly recommend that alteration in the law, though you wish Capital Punishment to be abolished?—Yes.

2587. (*Mr. Bright.*) With regard to the deterrent effect of the punishment of death, you have seen many prisoners tried, convicted, and sentenced, and many of them have been executed; have you generally observed a great feeling of terror and alarm and horror at the position in which they have been placed, and at the prospect before them?—I cannot myself say that I have not observed terror in a prisoner who was being tried for his life, and who was conscious that the punishment would be death; I have observed that, and I have also observed an apparent indifference. Take the case of William Palmer, I was not engaged in that case, but was a spectator for one or two days of it, and Palmer was, under apparent indifference, in my opinion in a state of intense mental anxiety, and there cannot be a doubt that the punishment of death has a terror for certain minds, when they come, as it were, face to face with it.

2588. Does it at all follow that because on the occasion of the trial, and still more on the occasion of the near approach of execution, a convict may suffer intensely, that species of punishment, so uncertain and so distant as it would be at the time of the commission of the offence, has much influence in deterring from it?—My belief is that it has not that influence in deterring from murder which it is supposed to have. When a man is upon his trial he has the prospect of death immediately before him, and therefore no doubt his feelings would be wound up to a greater pitch of excitement; but I do not believe that the man Palmer ever dreamt that he would be discovered, or ever

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thought of Capital Punishment when he committed his offence, and I do not believe that it exerted any deterrent effect upon his mind. Assuming that death punishment is thought of by the murderer in the very act of murder, which I doubt, it appears to me to be a great mistake to suppose that imprisonment for life, if certain, would not operate also strongly upon the minds of men who attempted the crime.

2589. (*Mr. Neate.*) I think you have said that you would allow the jury to find extenuating circumstances?—Yes, I would.

2590. Have you thought of any rule or principle which you would lay down for their guidance in finding extenuating circumstances?—In France, where the law has existed for about 30 years, they have two definitions of murder; they have *assassinat* and *meurtre*. The *assassinat* is the highest degree of murder.

2591. (*Lord Stanley.*) Murder with premeditation?—Yes.

2592. (*Mr. Neate.*) But *meurtre* is equally capital with *assassinat* when coupled?—Yes; but the jury have always the liberty of finding extenuating circumstances, and I believe that they find extenuating circumstances where no English jury would. Two remarkable cases occur to me. One was that of a gentleman who is now dead, but who was French correspondent to one of the daily London journals; he in a fit of jealousy, with premeditation, shot the paramour of his wife. He was acquitted. The other day a woman was tried for murder in Paris, and she was defended by M. Lachaud, one of the most eminent counsel at the criminal bar in Paris. This was her offence. She had a drunken husband; he came home perhaps drunk; he wanted to sleep with her; she at first refused him, and then she said that he might upon a certain condition, which we can all understand; he attempted to violate the condition; she coolly got out of bed and seized a knife, stabbed him, and killed him. She was acquitted. I believe that no such woman in England would be acquitted altogether. It might be manslaughter, or murder in an inferior degree.

2593. You cannot suggest any guiding rule?—No; it must be in the breast of the jury, and they are the responsible persons.

2594. Would not allowing them, as you suggest, to find a verdict of manslaughter meet the case?—Yes; that is only another way of putting it. Manslaughter is an English definition.

2595. (*Mr. Bright.*) And it would allow the Judge very much to vary the punishment according to what he considered to be the crime?—Yes.

2596. (*Mr. Waddington.*) Would you allow the jury to reduce a deliberate murder to manslaughter by finding extenuating circumstances?—That would be substantially a miscarriage of justice; but then the only ground upon which they would do it would be because Capital Punishment would be inflicted.

2597. You object to the system which is now practised in France but you would introduce it into England, owing to the greater confidence which you have in English juries?—I rather like the system of a verdict with extenuating circumstances; but I believe that, from the constitution of the French mind, which does not regard certain offences in the same light as we do, it would be safer with English juries than with French.

2598. Do you believe that French juries find extenuating circumstances in cases of the most deliberate and most malicious murders?—They do and they do not.

2599. You remember the case of Madame Lafarge, who administered poison?—Yes; but I am not quite sure that she would have been

found guilty in England; they did not wish her to be guillotined; that is what I meant. *J. H. Parry, Esq.*

2600. You are aware, I dare say, that extenuating circumstances do not apply in France to cases of murder only, but to all cases?—Yes; the jury have it in their power in that way in the instance of Capital Punishment to say that it shall not be inflicted; in every other case it amounts to a recommendation to mercy, which must be carried out by the judge. 4 March 1865.

2601. Does not it necessarily reduce the sentence in all cases by one degree?—Yes.

2602. Is it not very largely exercised in ordinary cases as well as in capital cases?—I cannot say that I am so familiar with the practice of the French courts as to tell you that; but I have often read of extenuating circumstances being found by French juries.

2603. Are you aware that it appears by the last *compte rendu* that in the year 1863 in 75 per cent. of the cases of persons convicted there were extenuating circumstances?—Yes, I remember that; I do not see any harm in it.

2604. Therefore in the whole course of the criminal proceedings in the Cour d'Assize, where the important cases are tried, the French juries find extenuating circumstances in 75 per cent. of the cases?—Yes.

2605. (*Mr. Neate.*) Is there any cause of just resentment which you think ought to reduce a deliberate murder to a case of manslaughter?—I would leave that to the jury. There are in my own mind such causes.

2606. One can easily conceive a just hatred by an innocent and honest man?—I should consider human infirmity in that case. You could not let him go entirely free from the consequences of his crime, but certainly if a man had been very much ill-treated and ill-used by another, and suddenly conceived the desire of murdering him, or even not suddenly, I would have that taken into consideration.

2607. (*Lord Stanley.*) Would you apply this in any case to murders committed with premeditation and design?—I certainly myself think that there are differences between the two crimes. Take the instance of Palmer, which is so constantly referred to, or take the case of Tawell, which was even a worse murder in my judgment than Palmer's, because he carried his murderous purpose about with him for three months; he attempted to murder the poor woman in the first instance, but he failed, because he gave her an overdose of the prussic acid, which she vomited up, and he then came back at the end of three months and perpetrated the crime. That is a murder of the very highest class. If it were the murder of a man who had inflicted a deep wrong upon the murderer I think that that should be taken into consideration; but I would leave it at large to the jury.

2608. (*Mr. Neate.*) There may be injuries done to a man himself, or still more to those whom he is bound to protect, or whose memory he is bound to protect, which would morally so far excuse in his mind a desire to kill the man who had so acted as to render him liable to a less degree of punishment?—I should consider that a less offence, and I believe that a jury would.

2609. Is not the desire for revenge in the case of those whom you are bound to protect mixed up with duty?—Yes; to avenge, for instance, the reputation of your mother. The slander of a woman has no doubt tempted many men to crime. That should be taken into account; but the English law makes no distinction in that respect.

2610. (*Lord Stanley.*) Is it not precisely because a crime of that sort

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has a temptation for minds of a class who would not be tempted to commit an ordinary murder that you ought to be very careful in not unduly relaxing the law as affects them?—You ought, no doubt, to be very careful in reference to human life. At the same time in all these cases I think that human infirmities and all the surrounding circumstances of the case must be taken into account, and I believe that you may safely intrust that duty to a jury.

2611. (*Chairman.*) Have you considered what punishment you would substitute for Capital Punishment?—Imprisonment for life. I have noticed that a great many suggestions of the difficulty of carrying that out have been made. I myself have thought that this mode of treating the matter might be adopted, that a prison should be set apart entirely for persons who have been found guilty of murder of any kind, whether it is murder in the first degree, or in the second degree, if such distinctions are to be introduced, or whatever the murder is; and I would set it apart just as you do in the case of criminal lunatics. You have no difficulty in keeping them at Broadmoor now, where there are a great many criminal lunatics. They are a very dangerous class of persons. Some of them, of course, are not lunatic, although they have been found so by a jury. Perhaps they were lunatic at the time, and have recovered, but they are never let free; they become aged men, as Mr. Justice Byles suggests in his letter; they become old and gradually die away, but still they are never again let loose on society; and I think that if a prison were set apart for murderers it would be a good thing. I think myself that a murderer should be considered as the highest criminal, and the punishment would strike the minds of persons the more if a prison were set apart for murderers; I must say myself that I believe it would have as deterrent effect upon crime as the punishment of death, always assuming that murderers think of the punishment in the act of murder.

2612. I suppose you would concede that supposing that it were possible to set apart a gaol for the purpose of keeping in perpetual imprisonment murderers, they could not be kept in anything like the comfort in which the lunatic prisoners are kept at Broadmoor?—Clearly not; they could not be kept in the same comfort as regards diet; they would not have luxuries allowed them, such as tobacco and coffee, and things of that sort which criminal lunatics are allowed.

2613. Is not Broadmoor very much like what any lunatic asylum would be to which persons not convicts are sent?—No doubt it is assimilated to it. There is the difference that all the inmates have been guilty of crimes, and crimes of personal violence.

2614. But so far as regards their personal comfort, and the attention which they get, and the indulgences which they receive, it would be very much like what takes place at Bethlem or any county asylum?—Certainly.

2615. (*Mr. Waddington.*) It is not a penal imprisonment?—No. I most humbly suggest what I have stated, because it has only occurred to me since I have been thinking of this matter, and I do not know that I have carefully weighed collateral circumstances. Instead of having them mingling together as they do in lunatic asylums, I certainly would have them imprisoned separately and apart, and imprisoned for life. My belief is that the public mind would consider that a very grievous punishment.

2616. (*Chairman.*) Would you put them to public works as is done at Portland?—No, I would imprison them and set them apart; I would not allow them to mingle with other convicts.

2617. Are you aware that at Pentonville it is found impossible to

keep convicts under the separate system for a greater period than 12 months ?—I am not aware of that. I know that the separate system has certain effects physically and mentally, and it might be very difficult to deal with individual cases; but I think that, as a rule, imprisonment for life would not lead necessarily to those mental effects in a majority of cases. Whilst I make this suggestion I am not at all wedded to it; I make it as a suggestion which has occurred to my mind, and will most willingly answer any question which you may be good enough to put to me about it; but I say that if the opinion of the public demands the abolition of Capital Punishment, it is the duty of the Legislature to supply a secondary punishment.

2618. (*Mr. Bright.*) Has there been any difficulty in discovering suitable secondary punishments for those offences for which Capital Punishment was once inflicted ?—None.

2619. Is it a question which admits of discussion, what should be the secondary punishment if Capital Punishment is abolished, supposing that you avoid torture ?—Yes; but at the same time I think the punishment which I have suggested would be still more impressive than any other punishment that I can think of.

2620. (*Mr. Waddington.*) You would abolish Capital Punishment, and then let experience show what is the best secondary punishment ?—Yes, I think so. If the public opinion is in favour of the abolition of Capital Punishment, then I say that the Legislature can as easily provide secondary punishments as they did in all that variety of offences which were formerly capital.

2621. If it was found that the prisoners could not be retained in separate confinement beyond a certain time without affecting their intellect, you would resort to the system of association ?—Yes.

2622. They might be associated for some time, and then sent back to separate confinement ?—Yes. Of course the great difficulty in those cases is that a man's mind may give way under separate and solitary confinement, and his brain may be affected. There can be no difficulty, I should think, in dealing with such a man; and those must be extreme cases, because, as regards the prisons of America, I remember that Harriet Martineau, in her "Recollections of Western Travel," states that she visited the gaols in Philadelphia, and that she conversed with a man who had been 15 or 16 years in prison in a separate cell for the murder of his wife. She gives an interesting account of the conversation which she had with him.

2623. He was confined in a separate cell, but I suppose was associated in labour with other prisoners ?—I believe not, from what I remember; it may be so; he was permitted to labour, for I recollect that he followed a trade. There is no doubt that the question of secondary punishment is an exceedingly difficult one to deal with; but I cannot see why, because it is difficult, it should not be dealt with.

2624. Are we not still making experiments upon it ?—Yes; and it is experimented upon in all countries all over the world.

2625. (*Chairman.*) Are you in favour of public or private executions ?—If the punishment of death is to be continued, I should certainly prefer private executions to public. Public executions are so demoralising and degrading, and excite so much disgust in the mind of anyone who has reflected at all upon them, whether he has seen them or not, and the classes of the community who frequent them are unfortunately of the very worst and lowest and most ignorant description, that I would get rid of them. No gentleman, except from pure eccentricity, and no respectable woman, would go to see a public execution,

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and yet I do not see why they should not, if a public execution is of the importance in deterring from crime that it is said to be.

2626. (*Mr. Neate.*) Are you not speaking from the experience of the metropolis?—It may not be so bad in the country. I have never seen a public execution, and never wish to do so. I have seen a man dangling from the gallows by mere accident in passing through Ludgate Hill.

2627. As far as you have heard, or have the means of knowledge, is it not the fact that the crowd in a country town is not at all composed in the same way as the crowd at Newgate is?—Probably London being so populous, and being the centre of a very ignorant and depraved population, the persons assembled in London may be of a worse character than those in the country. I do not speak from any knowledge or experience.

2628. Do you not think that there would be a great repugnance in the popular mind against private executions?—I do not think that it exists in America, where private executions take place. Of course they ought to take place in the presence of persons officially appointed; and one thing undoubtedly which would satisfy the public that the execution had taken place, would be that a coroner's jury should hold an inquest upon the body, which I see is done in New England. I think that anything is preferable to the assembling of such large multitudes of persons to see so disgusting a sight.

2629. Do not you think that the greater criminal would prefer a private execution, and that the lesser criminal, who might expect some sympathy amongst the crowd, would prefer a public execution?—Perhaps that might operate upon the minds of certain persons.

2630. Palmer would rather have been hanged in private?—Perhaps.

2631. Wright in public?—Possibly so.

2632. A private execution is rather an amelioration of the punishment to the greater and more detestable criminal, and an aggravation of it to the more pardonable criminal?—It would be so in the view which you have put, supposing that it operates upon the mind. Of course it is very difficult to say what would operate upon the mind of a man about to be hanged. With some persons what you say might have a great deal of force.

2633. (*Mr. Bright.*) Is not the fact that it is now agreed almost by universal consent that public executions are degrading and demoralising to be fairly accepted, in some degree, as an argument against the punishment of death altogether?—I think so, because it is almost a reproach to a man to go and see a public execution. He is considered to belong to a degraded class of persons who like to witness horrible and repulsive sights.

2634. And to enjoy sensations of a low character?—Undoubtedly. I myself think that that is so. The hangman is not treated with very great respect in this country. I do not see why he should not be, if he is executing the highest punishment, which is to protect society from the highest crime, namely, murder.

2635. (*Mr. Waddington.*) In some states of America is not the sheriff bound to execute the sentence himself?—I believe so, but that I think is merely formal. The most degraded man, I suppose, in the country is the hangman, and yet his existence is considered by a great many people essential to the interests of society. Why, then, should he be degraded?

2636. You are aware that in France it descends in families?—Yes, it used to do so, and in some parts of Germany.

2637. (*Mr. Bright.*) Looking at the diminished number of Capital

Punishments in this country, can you believe that the security of human life and the preservation of order in the community can be said in the smallest degree to depend upon the putting to death of a dozen or 15 wretched criminals annually?—No; I most sincerely believe that social safety does not depend upon putting such persons to death; that is my most sincere and earnest conviction, and has been for years.

2638. (*Mr. Waddington.*) You think that there would be no increase in murders if Capital Punishment were abolished?—I am sure, as far as any man can be sure of the future, that there would be none, and I believe that experience in other countries shows that there has been none.

2639. Supposing that the punishment of death were abolished, and that the punishment of penal servitude for life were substituted, would you leave it optional to the Judge to pass a sentence of penal servitude for life or for some lesser term of years, or would you make it absolutely imperative upon him to pass a sentence of penal servitude for life in cases of malicious murder?—In the cases of the highest class of murder, that is to say, prepared and planned and malicious murder, I would not allow the Judge to pass a more lenient sentence; but I would let recourse be had to the mercy of the Crown afterwards, if there were circumstances to be taken into consideration. I would not give the Judge the opportunity of altering the sentence in such a case.

2640. Therefore legislation would be necessary in that respect?—Clearly.

2641. You must distinguish the classes of murder in which the Judge would have no option, and those in which he would have an option?—Clearly he should have no option, as he has none now, in cases of unmistakeable murder. But Judges now often remind the man upon whom they pass the sentence of death, "This, recollect, is not my "sentence, but the sentence of the law," so as to relieve themselves, as it were, from any personal connexion with a man who they know is about to suffer death.

2642. Have you observed that the recommendations of juries to mercy are confined to cases of a less aggravated description, or that they extend to the more atrocious cases?—I do not remember a case of the most atrocious description where the jury has recommended to mercy. I am sorry to say that I have known cases in which the jury has recommended to mercy, where the recommendation has not been carried out by the authorities.

2643. I am speaking now of the very worst class of cases, such as that of Palmer, or Manning, or Rush?—Certainly not. I think that, as a rule, juries are persons of very excellent common sense, and especially in criminal matters. They may, of course, be wrong at times; but I would rather that my life should be in the hands of a jury than of a Judge.

2644. You do not apprehend that there would be any difficulty in obtaining a conviction in the worst class of murders if the evidence warranted it?—Certainly not; and I believe that it would prevent the worst class of murderers getting off as they now do under Capital Punishment. I could mention six or eight instances within my own knowledge in which men have been acquitted purely upon the ground that the punishment was capital.

2645. (*Mr. Bright.*) You have had long experience with juries, and you have evidently a high opinion of them. In addressing a jury on behalf of a prisoner, do not you feel that so long as he is liable to be hanged, everything else being the same, you have a much better chance of getting his acquittal than you would have if Capital Punishment was

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abolished?—I do. I believe, and I know, that juries have acquitted men clearly and beyond all doubt guilty of murder, and some of the very worst murders that have ever been committed in this country, and have done so simply because the punishment has been the punishment of death ; they would have convicted if the punishment had been imprisonment for life, or any punishment short of taking the life of the man, and they have seized hold of any excuses rather than be the agents in putting Capital Punishment into operation.

2646. The counsel for the prisoner also, I presume, avails himself of pretexts, which if they are not flimsy, are at least strained, and for the very same reason ?—It is familiar observation at the Bar, that in a case of murder the jury require the highest possible amount of proof proof beyond the necessary point which they would require in any other case ; there is no doubt of it whatever, they require a higher degree of proof in cases of murder, and therefore counsel may suggest, as they often do, theories to the jury which would not avail in other cases.

2647. They employ appeals to the feelings of the jury which they would not think it worth while to employ, and which would be unavailing, if the punishment was not capital ?—Clearly, I think so.

2648. When you have 12 men in a jury box, there may be one or two or three amongst them who are not only conscientious but highly sensitive, and such appeals have a great effect upon them ; is it not so ?—Certainly, and any appeal to the jury as regards the sacredness of human life has a very great effect upon them. Amongst a large portion of the Dissenters of this country there is an opinion against the punishment of death, and that is wholly upon religious grounds ; there are hundreds of thousands of conscientious men who believe that no human tribunal has the right of taking the life of a man, and that operates upon their minds if they sit as jurymen. The course which I have now n adopted, and which I have adopted myself, is to select a jury ; the prisoner has 20 peremptory challenges without cause ; in one or two cases in which I have defended for murder, I have pursued that course where persons have been got upon the jury who are conscientiously opposed to Capital Punishment, who would however find a verdict according to their oaths, but who take hold of any opportunity, that is plausible, in order that they should not be parties to the punishment of death ; I am certain of that.

2649. (*Mr. Waddington.*) Have you observed that cases of that nature have become more frequent, or less, of late ?—I believe more frequent.

2650. Have you observed that, generally speaking, in all cases juries, according to the severity of the sentence and the punishment, are more indisposed to find a verdict of guilty ?—Yes, the severity of the punishment, of course, operates strongly upon their minds, especially in the case of an irrevocable punishment.

2651. In a case where the question arises as to whether there has been an attempt to murder or merely unlawful wounding, which only amounts to a more serious sort of assault the juries select the latter ?—Yes, almost always. Within a very short time an attempt to murder was a capital offence, and a woman of the name of Cheshan was executed for it at Chelmsford, under Lord Campbell's direction.

2652. In the year 1861, I think, an attempt to murder ceased to be capital ?—Yes, I think so.

2653. Have you any reason to suppose that the crime of assaulting with intent to murder, or of attempt to murder, has increased since that time ?—Certainly not ; I do not believe that it has ; and I think that an

attempt to murder is sometimes as great a crime as murder itself. There was a case tried by Mr. Justice Cresswell, of a man who wanted to get rid of a young girl whom he had seduced, and to whom he had promised marriage; he took her to a wood near Dulwich, cut her throat, and left her there for dead. He was as great a murderer in his heart as ever came into a court of justice, but he missed his aim. Mr. Justice Cresswell passed sentence of death upon that man, and the Home Office would not execute it. I should like to repeat finally my opinion that if Capital Punishment were abolished, fewer criminals would escape than now escape under our law, that the administration of justice would be more certain, and certainty of punishment is a most important element in punishment; and I believe that the safety of society would in no way be imperilled if Capital Punishment were abolished.

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The witness withdrew.

HENRY CARTWRIGHT, Esq., examined.

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2654. (*Chairman.*) You are a barrister-at-law?—Yes; and I am Governor of the Gloucester County Prison.

2655. How long have you been governor of that prison?—Three years; before that time I was a stipendiary magistrate in the West Indies for 15 years.

2656. Before that were you in the army?—Yes, originally. I may say that I have had my attention turned to this subject for a great number of years, having first thought upon it in consequence of what I noticed and heard of the evils of public executions. My attention was first drawn to that point, and it led me think on the subject of Capital Punishment itself.

2657. Which would you prefer for us to take first, the question of public executions, on the question of Capital Punishment?—I would express an opinion on public executions.

2658. Are you of opinion that if it is thought advisable to retain Capital Punishment, it should be carried out in public or in private?—In private, decidedly, as being more deterrent, adding far greater solemnity to the punishment, and as being more humane to the criminal himself; for it is painful to think that a man who is going to end his life is to be taken suddenly out before the gaze of a great number of people; the whole of the influence which the chaplain has established in his mind is suddenly upset, and his religious sentiments are diverted by his attention to the mob and the gaze of the mob. I think that it is a most cruel thing to send a man into another scene altogether before an excited mass of people.

2659. Upon the general question of the abolition of Capital Punishment, are you of opinion that it should be retained or abolished?—I think that it should certainly be abolished. I thought a good deal upon the subject some years ago when I was in America, when I first turned my mind to the question of the abolition of Capital Punishment. I am not quite sure about the state of the law in the various States, but I found among the thinking people who were connected with prisons, having employed myself in visiting the different great prisons, that the whole of the people with whom I came in contact seem to express a strong desire to abolish Capital Punishment universally in the States; they were of opinion that it was altogether opposed to the sanctity of human life. The great failing in the social habits there is the little value which is attached to human life, arising from social causes, the low estimation of the Irish, and no doubt the slave question; but among the

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leading people in the States,—not political people, but people who confined their attention to criminal matters because it seemed to open a sphere for their philanthropy and the exercise of benevolent feelings,—their opinion and the opinion of all of those with whom I conversed was an anxiety to abolish Capital Punishment, because its abolition would add to the sentiment that human life was too valuable to be tampered with.

2660. Have you had an opportunity since you have been the Governor of Gloucester Gaol of forming any opinion of what the feeling of the criminals themselves is?—Since I have been more immediately in connexion with English convicts, I have thought that the argument in favour of the abolition of Capital Punishment relies principally upon its not being deterrent; it is not deterrent sufficiently to that class of men, who are perfectly reckless, who go in for what they call a good thing; they know that hanging will be the result of murder if they add that to their crime, but they do not consider it at all deterrent. They prefer running the risk of their life in accomplishing the object which they have in view. I believe that to the ordinary class of criminals hanging is as deterrent as perpetual imprisonment; they make no distinction; they believe that in the event of robbery if they add murder to it it will entail a more severe punishment, but I do not think that they take into their minds whether it will be hanging or not; they have merely an indefinite idea that the addition of murder will make their crime more notorious, and therefore add to the chance of being found out, and that it will subject them to a greater punishment. I believe that if criminals of that class knew that the addition of murder to a burglary would entail perpetual imprisonment for life, it would be more deterrent than the prospect of being hanged.

2661. Then your opinion is that the convict class dread perpetual imprisonment more than they dread death?—Certainly.

2662. (*Mr. Hunt.*) Did you ever know a man sentenced to death, who was not willing to exchange it for perpetual imprisonment?—No, but I have known three very painful instances in which persons have been acquitted on the ground of insanity, and in each case those men told me that they decidedly preferred being hanged; that they dreaded perpetual imprisonment more.

2663. (*Lord Stanley.*) But that was after the commutation had been announced to them?—Yes.

2664. (*Mr. Bright.*) In each of the cases did they express that opinion only after the commutation had been announced to them?—Yes.

2665. (*Mr. Hunt.*) Those were not cases of commutation of sentence, but of acquittal on the ground of insanity?—Yes; their counsel took advantage of certain points. There is a case in my eye now in which a charge of murder is hanging over a man, and his counsel has suggested to him, in speaking of the matter, that an attempt should be made to show that he was insane, and he fights against it; he prefers to run the risk of being hanged to having his insanity established.

2666. (*Mr. Bright.*) Is that because he revolts from the idea of his insanity being established, or because he is shocked at the thought of the perpetual imprisonment to which he would be subjected?—He dreads the perpetual imprisonment so much.

2667. (*Mr Hunt.*) That is to say, perpetual imprisonment as a madman?—He is not sane.

2668. But he dreads being shut up as a madman?—He dreads being deprived of his liberty for life.

2669. (*Lord Stanley.*) Is it not characteristic of many insane persons, especially of insane criminals, and one of the surest tests by which you

can detect a real from a feigned insanity, that a madman will very often decline to acknowledge that he is mad, although he may save himself from punishment by so doing ?—Yes ; a madman generally declines to acknowledge his being mad.

2670. Even though he may save himself from punishment by so doing ?—Yes.

2671. (*Mr. Hunt.*) You have said that you think that if there was a heavier punishment attached to burglary where murder was also committed, although that punishment was not death, still the criminal classes would shrink from adding murder to burglary ?—Certainly.

2672. Upon what do you base that opinion ?—Because they consider the punishment of perpetual imprisonment greater than that of death.

2673. What data have you for that opinion ; you say that you have known no person sentenced to death who has expressed regret when the sentence has been commuted ; why do you think perpetual imprisonment a greater punishment ?—I argue from the belief that murders are not generally committed in burglary from the fear of some other punishment, and assuming that fact, I am fully impressed with the belief that the fear of perpetual imprisonment would be equally deterrent with the prospect of being hanged.

2674. That is merely your opinion ?—Yes ; I cannot state it as a matter of fact.

2675. Have you ever heard criminals say that they would rather be hanged than be imprisoned for life ; I am putting aside persons who are acquitted on the ground of insanity ?—In speaking on this subject to men who have suffered transportation and returned, I have ascertained from them that they would dread the sentence of penal imprisonment for life much more than the sentence of being hanged.

2676. (*Mr. Bright.*) With regard to the deterrent nature of the punishment, do you think that we ought to be guided by the terror which a man feels when sentence is passed upon him, or between the time of his sentence and his execution, or that we ought to be influenced by the view which he takes of the matter at the time when he commits his offence?—The effect shown by a man after having sentence of death passed upon him, I think, has nothing to do with this question,—that is a mere animal terror of the approach of death which always exists, and would exist in the case of an unruly mob dispersed by soldiery ; they would instantly disperse because of the fear of death. Although the criminal when he committed the crime had not the slightest fear of death, yet he would be seized with animal terror directly sentence was pronounced, and would give all the evidences of a fear of the punishment.

2677. When you say that a person committing such an offence as burglary would be as much influenced not to commit murder by the fear of imprisonment for life as by the fear of hanging, would he not also be likely to have a knowledge that the punishment was more certain to him if imprisonment for life was the punishment, than it would be if Capital Punishment was to follow?—That is just the point on which I found my opinion that penal servitude for life has greater terrors than hanging, because if you substitute penal servitude for life in lieu of hanging, it will become positively much more certain. The feeling among the criminal classes now is, that if a man is tried for murder there are a great many chances that he will get off ; it is considered a very uncertain punishment. A man of that class tried for murder, who has mixed up with the criminal classes habitually, believes very strongly in his chances of getting off ; that is inherent among the criminal classes.

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2678. You find that juries require more absolute demonstration of the commission of the offence, so that there can be no possibility of doubt about it, in capital cases than they do in others?—Most decidedly; and it is very plain, in watching trials for murder, that the jury have a most painful sentiment as regards bringing in a verdict the result of which they know will be death, that they fight shy of it in every possible way, and seize with pleasure every point which is raised by the counsel which will at all enable them to look upon the offence as manslaughter, in order to get rid of the necessity of bringing in a verdict which will ensure Capital Punishment; and from what I have noticed lately I find that that sentiment of objection to Capital Punishment is increasing very largely among our lower and middle classes, namely that portion who form the petty juries, and that must add to the uncertainty of the law being carried out as a punishment for the offence of murder.

2679. Have you any facts to support your opinion that a disinclination to return verdicts of guilty in such cases is increasing; do you see that men try more to escape being on a jury, or how do you observe it?—I know from communication with that class that the sentiment against Capital Punishment is very rapidly increasing amongst them. I think that a great deal arises from the fact that the Dissenters generally hold that opinion, and that class being very largely on the petty jury list, the opinion exists very strongly there.

2680. You do not know, I presume, that the Dissenters of whom you speak hold it as an absolute opinion that Capital Punishments are not lawful (I am speaking of the highest law), but that they regard them as opposed to the sentiment of Christian charity and mercy?—A very great many of them oppose Capital Punishment on religious grounds; they believe that it is opposed to the Bible. That is a very strong sentiment, and I think that that is principally held amongst that class of persons. I do not think that they have so strong a feeling as I have entertained, that the frequency of public executions, or the resort to public executions, tends to lower the value of human life, and greatly to demoralize the sentiment of the people. I believe that they are principally actuated by a religious consideration.

2681. And that they themselves very much shrink from being connected with the punishment of death?—I believe that there is very great danger of having more than one man on a jury who will be determined, as far as he possibly can, not to bring in a verdict of guilty if the result be hanging, and that he does so solely on account of the preponderance of opinion against him in the room, and from the natural weakness of our nature to yield to the opinion of men opposed to him.

2682. (*Chairman.*) Of what portion of the country are you speaking when you say that there is a general indisposition on the part of the middle class to serve on juries from the fear of having some capital case brought before them; do you speak of any particular locality, or do you speak simply of the opinion of Dissenters generally?—I only speak from personal experience of the part of the country in which I have been living, namely Gloucestershire.

2683. (*Mr. Waddington.*) Do you mean the city of Gloucester, or Gloucestershire generally?—Gloucester and Bristol.

2684. (*Chairman.*) Am I to understand you that there is any difficulty there in finding juries?—No, there is no difficulty in finding juries, but I only state my observation of the difficulty with the jury where they have to arrive at a verdict of guilty; the indisposition would exist if a man knew that he was impannelled to try a case of murder. There is no general indisposition to be on a jury, because they do not know that they shall have to try a case of murder; but I think that

there is a very general indisposition to be on a jury which shall try a murder case.

2685. (*Mr. Bright.*) Do you think that that indisposition would not be felt if the question of Capital Punishment were not involved ?—Most decidedly not; there is no reluctance at all to perform the duty of jurymen.

2686. I believe that the members of the Society of Friends are the strongest in their opposition to Capital Punishment; have you had occasion to observe that ?—Yes; they have very decided opinions upon it.

2687. Have you known any cases in which they have asked permission to be excused from serving on a jury on that ground ?—No.

2688. Do you think that the opinion which they have notoriously held has been existing amongst the other free churches ?—I think that there is no doubt of it.

2689. (*Mr. Hunt.*) There is no difficulty in getting a verdict at Gloucester in a capital case if the evidence warrants it, is there ?—It is very painful to observe during the progress of the trial the condition in which the jury appear to be.

2690. Of course they have a sense of very great responsibility ?—A very serious sense of it.

2691. And that you would wish ?—Yes.

2692. Have you known an instance since you have lived at Gloucester of a jury refusing to give a verdict of guilty in a case of murder where the evidence warranted it ?—I have found juries give, contrary to the direction of the Judge, a secondary verdict, not a capital one, where the Judge's charge has been directly against the prisoner.

2693. In how many cases ?—Of course in one spot there would not be many cases.

2694. I am speaking of the time since you have been governor of the gaol ?—I have in my mind's eye two cases where the verdict has been decidedly against the Judge's charge.

2695. (*Mr. Bright.*) That is in three years ?—Yes; in one case a mother had taken out a child into the country and killed it, and hidden it in a garden.

2696. Was it an illegitimate child ?—Yes. In that case the Judge, as far as I can form an opinion, gave the most positive direction to the jury to return a verdict of wilful murder, but they did not do so—I forget what the verdict was—but the woman was imprisoned for a year.

2697. (*Mr Waddington.*) They returned, I presume, a verdict of manslaughter ?—It was probably manslaughter.

2698. (*Mr. Hunt.*) But you do not remember the particular circumstances ?—No.

2699. (*Mr. Bright.*) Excepting the youth of the child, it was a case of aggravated murder ?—Yes.

2700. It differed only from ordinary cases in its being her own child, and a young child ?—Yes.

2701. (*Chairman.*) Do you believe that there exists among females a general belief that they will not be executed, even though they are found guilty of wilful murder ?—Yes, that seems to be the general impression amongst women. Cases of infanticide appear, I think, to be increasing, a greater number are brought forward than there were; but the sentiment amongst the young women themselves seems to be that they will not be hanged. I have spoken to them officially when they have come to prison upon any charge, and although I have found their minds fully impressed with the magnitude of the crime, yet when I have alluded to the possibility of their being hanged for the offence, they have invariably expressed a disbelief in it.

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2702. (*Mr. Hunt.*) And you think that the crime is increasing ?—I think that it is. I have not looked at the statistics upon that point.

2703. (*Mr. Neate.*) Do you suppose that by the abolition of Capital Punishment the difficulty of maintaining order in gaol would be greatly increased ?—No, I do not think that it would at all.

2704. Have you ever had to do with the Government prisons ; have you ever had under your care persons sentenced to imprisonment for life ?—Yes ; not in this country.

2705. (*Chairman.*) But as the governor of a gaol ?—No, but as having magisterial supervision.

2706. (*Mr. Neate.*) It has been suggested to us that unless you can hold over those men who are under sentence of imprisonment for life the great terror of death, you have not sufficient control over them ; do you agree with that ?—I do not believe that it exists at all. There would, no doubt, be very great difficulty in managing Anglo-Saxon people who were sentenced to imprisonment for life, because despair so soon sets in when hope is destroyed, that the management would have to be one of a very high character ; the religious sentiment would have very much to be cultivated, and a man would be compelled to have some alternation of punishment from that of mere solitary imprisonment. I do not believe that you could ever keep a number of the Anglo-Saxon class in solitary imprisonment with the knowledge that they should never get out of it.

2707. Then you believe that the difficulty of managing a large prison with such prisoners would be increased by the abolition of Capital Punishment ?—No, I do not. I merely say that it would require a treatment of a very high character to get a number of Anglo-Saxon people to live with a knowledge that they were to be perpetually imprisoned.

2708. (*Mr. Bright.*) Some witnesses have stated that with the worst class of criminals, for instance such as used to be at Norfolk Island, and such as are at the galleys in other countries, unless you could hold over them the terror inspired by the fact that they could be put to death notwithstanding their past sentence, if, for example, they murdered a warder or gaoler, there would be no security for the lives of warders and gaolers if Capital Punishment with regard to them were abolished. Is that your opinion ?—I do not think so. I do not believe that the knowledge that an assault with intent to murder would be followed by Capital Punishment would add to the security of the warders, so long as it was known that there was a punishment expressly set apart for murder.

2709. (*Mr. Neate.*) But they would be already undergoing that punishment ?—No ; I should suggest an alternative.

2710. (*Mr. Bright.*) Supposing 50 men in Gloucester Gaol to be now undergoing the sentence of penal servitude for life for murder, taking the highest punishment which the law now awards short of death, do you think that you could secure the lives of the gaolers and warders conducting that prison without having recourse to the punishment of death ?—If the criminals knew that, death being abolished, there was no other punishment, you would, of course, lose the authority which the fear of death gives you over them ; but I would argue that if the abolition of death was carried out there would be substituted for Capital Punishment another punishment such as imprisonment for life, that is to say, civil death, total seclusion, and there would be such arrangements as would cause the public at large to understand that when a man was subjected to that punishment he would disappear for

ever, and that punishment would then become even more deterrent than the fear of death.

2711. When you had got 50 men who were undergoing that punishment for murder in your charge in any prison, or island, or wherever they might be stationed, and they knew that under no circumstances could they be hanged for any crime committed in their then position, how would you secure the lives of warders and gaolers?—If prisoners of that class gave evidence of homicidal tendencies towards the warders and gaolers, it would be necessary to have a very strong staff to manage them, but I believe that in the event of the establishment of an institution where men were confined, as an alternative to Capital Punishment, there would have to be special arrangements made; their lives would no doubt have to be passed in severe industry, but the arrangements would have to partake of the ordinary character of normal life as much as possible—normal poverty I should say, and in the event of any attempt at an outbreak of that sort, there would be a worse punishment, namely positive confinement in a gaol.

2712. (*Mr. Neate.*) You must have an occasional aggravation of punishment?—Yes.

2713. (*Mr. Bright.*) Is it your opinion that the enduring of that life punishment would have a tendency to make men savage, or rather to humble their spirits and to make them more docile if they were treated with some sort of personal kindness?—That would, of course, depend entirely upon the management, therefore I say that it would require management of a very high class; it would be a very difficult question. There would be the necessity of forming a sort of industrial training of these people; they would be placed in a certain institution where they would understand that there was no chance of escape for them. The moment that that was brought home to the mind I believe that they would awaken to a new life, and would accept the religious influence and submit themselves to the rules of the place.

2714. (*Mr. Waddington.*) For assaults upon warders in your days was flogging administered?—Yes.

2715. Have you ever known that produce a good effect?—I have only known one instance of it in three years. It checks it instantly.

2716. That might be applied to a prisoner in penal servitude for life; he might be punished for a particular offence by a severe flogging?—Certainly; I contemplate it as a punishment for special offences—what may be called prison offences—that should never be lost sight of.

2717. Those prisoners would be amenable to the ordinary prison discipline just as they are now?—Yes. In thinking of the alternative for Capital Punishment, I have almost entirely adopted the opinion which Mr. Phillips in his book advanced some time ago, of the institution of a place, such as I have alluded to, in which the prisoners would be perpetually confined.

2718. Do you think that any of the convicts believe in the existence of such a thing as perpetual imprisonment under the present system?—No, they do not; penal servitude has comparatively lost all its terrors with them.

2719. They are perfectly aware that it will not be perpetual?—They are perfectly aware of it. Penal servitude, as it has been conducted by the Government, has almost entirely lost its terrors, so much so that I have known instances in which men have positively sought it; they have preferred it to ordinary labour.

2720. Then the imprisonment which you speak of as being more deterring than Capital Punishment is a different kind of punishment?—Yes; I contemplate a special punishment by Statute, of removal altogether from

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society, and a perfect civil death, otherwise the deterrent power would be lost. To make it superior to the death punishment in deterring power, it must be performed under a special Statute without any prospect of remission.

2721. If there were a prospect of remission, that in your opinion, would destroy the deterrent effect?—Of course.

2722. Such a punishment as you describe you think that these men would consider as more to be dreaded than Capital Punishment? — I believe so.

The witness withdrew.

Adjourned to Friday next at 12 o'clock.

Friday, 10th March 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Right Hon. Sir L. Peel.

The Right Hon. SIR LAWRENCE PEEL examined.

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2723. (*Chairman.*) You were a barrister-at-law in this country?—Yes, I was called to the bar and practised on the northern circuit for about 16 years before I went to India.

2724. And at the end of 16 years you went to India?—I went out first as Advocate-General, and after I had served about a year and a half in that office I was appointed Chief Justice in the Supreme Court at Calcutta.

2725. How long were you Chief Justice?—About 13 years.

2726. You are no doubt familiar with the Indian penal code?—Yes; when I first went to India it was shortly after it had been promulgated by the Law Commission, it was then submitted generally to the Judges of the East India Company in the country, and also to the Judges in the presidencies. A variety of opinions were written upon it under great consideration, and upon Mr. Drinkwater Bethune's coming it was submitted to him; he disapproved of a large portion of it and altered it very materially. His alterations again were not acquiesced in, and upon his death another review of it I think was entrusted to Mr. Peacock, and he I think disapproved of the alterations and of parts of the original. I speak rather of the execution of it than of the principles upon which it was based. It was finally entrusted to a committee of the Legislative Council of India, upon which I sat, and also Sir James Colvile, another of the Judges; but we had made very little way I think when I left India, and therefore I am not very well acquainted with the shape which it finally assumed, but I know that it underwent very great care and attention, and I understand that it has now been in use for about three or four

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years. I have asked a gentleman who was engaged in the administration of justice under it how it works, and I have been informed that on the whole it works satisfactorily. After I received a summons to attend this Commission, I asked Mr. Hawkins whether he had heard anything from India; he is at the head of the Judicial department and has had long experience of the working of the Company's Courts in India, and was finally a Judge of the Sudder Dewanny Adawlut at Calcutta; he tells me that they have had no particular report of it, but that he thinks that if it had been found to work unsuccessfully he should have heard of that result. But I must observe that it was framed altogether with a view to the particular circumstances of British India. It laboured under great disadvantages, and probably no code was ever concocted under such great disadvantages, for it was a penal code to enforce the observance of rights where no civil code actually existed, where there was extreme uncertainty as to what body of law prevailed in India at all, and where in the administration of the criminal law they were applying the old Mahomedan law with a vast number of alterations which were not very well defined, and where a criminal who was not a Mahomedan was entitled to reject the Mahomedan law, and to ask to be judged under regulation law. Consequently the whole law was in some state of uncertainty. Then the Judges were Judges alike of law and of fact, and they had not juries except in the presidency towns. No juries existed in the mofussil towns when the code was framed. The Judges were not generally professionally educated, and had generally had no legal training; some of them were very able men and administered justice with very great efficiency; others on the other hand were necessarily of an inferior class as respected knowledge to those to whom the administration of justice is generally entrusted here. Then again they had not the aid of counsel, nor indeed of professional advocacy of any high order. The native vakeels who practised before them generally speaking wanted that independence which a British advocate has, and they generally speaking wanted a high degree of knowledge. Therefore, they were obliged, in framing the code, to enter into descriptions of offences, and the enunciation of principles, and to go into details which would be very objectionable if they were at all introduced into the body of law employed here, and I will explain why, looking at the code, it appears so very involved. If you look at the enactment to which Mr. FitzJames Stephens' attention was directed, by itself it is imperfect, and it requires to be read, as all the provisions of that code do, in conjunction with explanatory chapters. The fourth chapter contains general exceptions, there is another branch which contains general explanations, and they are directed to be read in conjunction with every particular clause, unless that particular clause contains the special exceptions to which it is to be subject. Consequently if you look at any portion relating to a particular offence, unless you read it also concurrently with that portion of the general chapter which relates to the same subject, you will be liable to fall into error as to its meaning. Therefore the Judge who has to apply that law is supposed not to have his mind embued with general principles of law, which are to regulate special enactments, but he has to read it first in conjunction with particular portions, and then to read it again with the exceptions which are engrafted on it. In this particular portion of the law relating to murder you begin with four branches. If you look at them attentively you will see that, after the first, the three other branches, in the administration of our law, would be

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evidence respecting the intent which is contained in the other. I believe that the Law Commission when they framed their code were very desirous of excluding altogether a judicial interpretation, they aimed at that.

2727. They wished to leave it to the jury?—They had no jury, but they wished to limit the office of the Judge and to exclude entirely if they could, but to exclude as much as possible, judicial interpretation.

2728. (*Lord Stanley.*) That is to say to tie him down as closely as possible?—Yes, that is the object; for instance, they would not have allowed the Judge to presume the intent in the way in which it is done here, to presume knowledge from circumstances, and so on, their object was as much as possible to exclude it. It was found unattainable because when they came to the other portions of the law precisely the same process was to be gone through by the Judge in applying the law which would have to be applied in judging of intent, and therefore I believe that that was very much modified in the after revisions of the Code. But if the thing had to be applied here the Judge would direct the jury as to the intention, that the man was to be presumed to intend the reasonable and probable consequences of his acts. That was a thing which they did not like, and therefore they embrace what would be the directions of the Judge in the form of distinct enactments.

2729. (*Mr. Waddington.*) Examples?—Yes, that would explain why it went so very much into detail. I do not say that they acted wrongly, or wish to criticise their performance the least in the world, but I say that it was rendered necessarily diffuse by reason of the absence of any special principles applicable to the administration of justice. Different Courts had different rules of procedure and different principles, and there was the want of any exposition of principles to be applied, consequently it rendered it almost necessary for them to make those subdivisions.

2730. (*Lord Stanley.*) Everything had to be put in writing, and nothing was to be taken for granted?—Yes.

2731. (*Mr. Waddington.*) Has this code superseded all other criminal law, does it govern all the actions of the natives as well as of the British settlers?—Yes; with the exception of what may be called police regulations and police laws applicable to special subjects, but with that exception it is intended to have that general application.

2732. Are the natives tried by jury as well as the British subjects?—In the presidency towns they always were, but not beyond them, they have now the power to extend the jury system I believe to any part of India, but they have only applied it as yet experimentally and tentatively generally speaking now in the presidency towns, and within 14 or 15 miles it is applied, and I believe that it works very well. They tried it in Bengal in those districts where the indigo disturbances have prevailed, and there they have been obliged to leave matters alone, and to revert to the old system, for they found that the indigo planters on the one hand and the natives on the other serving on juries were so prejudiced that they could never get convictions and therefore they were obliged to drop it.

2733. Do they retain the English law, as distinguished from the Scotch, of requiring unanimity in the jury?—Yes; the natives serve upon the juries, and generally speaking it has been found to work very well.

2734. (*Chairman.*) Do you think that it would be possible to classify murder in this country in the same manner, or in somewhat the same manner, as is done by the Indian code?—Yes, I think so;

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there would be difficulty in wording your law; it would require care and attention, but I do not see any difficulty at all in the thing ; it is what everybody does who sits as a Judge and who has to explain to the jury the distinctions between manslaughter and murder ; it is what every Judge has to do who when he comes to consider what sentence he will pass has to distinguish between the degrees of guilt in every one of those instances ; before he can justify it, to himself, to pass a minor punishment he must make that kind of distinction within his own mind of what are the distinguishing features between the graver and the lighter offence. If he were called upon in any way to express his reasons, whether to a tribunal sitting in appeal from his judgment or to any person who required an explanation of the apparent inconsistency in his judgments, he must go into an explanation of his reasons. If his own views are clear to himself, as they ought to be, he will have no difficulty whatever in explaining them to the jury, and if he had to write his charge he would have no difficulty in putting into writing that which he had given as explanation. If he had to put into writing the reasons of his sentences he would have no difficulty in doing so. Therefore there would be no difficulty in putting it into the form of a law. Consequently, although it would require great care in wording, I do not think that it is a thing which is attended with very grave difficulty.

2735. (*Mr. Waddington.*) Supposing that it could be effected, would you allow of a classification which would confine Capital Punishment to murder of the most deliberate and aggravated description ?—Yes, I certainly should.

2736. Would you retain Capital Punishment for murders of the very worst description or would you abolish it altogether ?—I consider it a very difficult subject, and I do not think that my opinion is entitled to any weight from my long absence from this country, and it is so long since I have been engaged in the administration of criminal justice in this country, that I should speak with the greatest possible diffidence. To answer such a question you must be something of a prophet, you must foresee what would be the consequences of the change and it would require a very great degree of knowledge of the habits of that class of people who are most likely to become the subjects of criminal administration. It seems to me to resolve itself rather into a question of calculation whether the number of deaths would on the whole augment. If for instance by the passing of a law abolishing Capital Punishment for murder there would otherwise have been in a particular year three or four executions, and the number of deaths was augmented in that year or in common years by that number, or by a greater, there would be no saving of life effected by that.

2737. You mean if the number of murders were augmented ?—Yes, it would be merely the substitution of a loss of life of innocent persons in order to save the lives of a few culprits, the balance therefore, would be on the side of suffering and misery. Then on the other hand no doubt a great many collateral and incidental advantages would be derived, they are all glanced at in the evidence, and I can add nothing to what has been said. On the whole my own impression is that it would be unadvisable to make the change, and I think that in cases of murder of the very gravest class the punishment of death should be retained, but I speak doubtingly, and I confess that I think that my own opinion is entitled to very little weight upon the subject.

2738. (*Mr. Ewart.*) Do you think that any great disorganization of

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society would result from the abolition of Capital Punishment ?—No, I have not the least notion of the kind. I believe that it would be attended with nothing of the sort.

2739. (*Mr. Neate.*) Do you consider that the mere fact of the abolition of Capital Punishment, producing some slight or even for a time some considerable increase in the number of murders, is of itself a conclusive objection to the abolition ?—If it were only limited for a time I should think not, but then I have no certainty that it would be limited for a time. I think that it would be a permanent matter.

2740. Do you not think that there might be collateral advantages in the abolition, which would more than counterbalance the loss of a few innocent lives ?—I think that there would be collateral advantages, but whether they would counterbalance the other consideration is a calculation which I cannot make, there would be so many uncertain elements in the inquiry.

2741. Has there been practically much difficulty in interpreting the Indian code as to murder ?—I believe not. I have inquired since I received a summons to attend this Commission, and I do not find that here has been any difficulty at all. I believe that Sir Mordaunt Wells would be most likely to answer that question, for I understand that he sat most frequently in the Criminal Court.

2742. You have not yourself had much to do with the administration of this code ?—No, it had not come into operation when I left. I have been nearly ten years out of India now.

2743. Looking at the difference between the English character, and the Indian character, should you say that there might be reasons for continuing Capital Punishment in India, and a necessity for it, which did not exist in England ?—No. I should rather be in favour of the abolition of it there than here for the following reasons. In the first place, unfortunately very little reliance can be placed upon testimony, not only upon oral testimony, but upon documents. I have had such painful experience of the fabrication of charges which had no reality, that there was greater difficulty as to the application of the laws. I must confess that I always sat with some degree of fear and trembling, not because I felt my own inability to do my duty, but because I could place so very little reliance on the evidence which was given. I can give instances of charges which were fabricated, and which were of so extraordinary a nature that you would hardly suppose it possible for them to exist. I will mention one instance which occurred to myself. An application was made to me in chambers for a writ of *habeas corpus*. It was accompanied with an affidavit detailing all the circumstances upon which the parties applied. The charge was that a wealthy baboo in the neighbourhood of Calcutta, residing four or five miles away, had carried off, or caused to be carried off, a girl of tender years for the purpose of placing her in his seraglio, and stating all the circumstances of the abduction. It was all supported by affidavit. I granted the writ, and a return to it was made by this gentleman in which he denied the abduction altogether, and it was accompanied with an affidavit (which is customary there), supporting his return, and I think fortified by one or two other affidavits. They also said that they believed that the prosecutor had been put up to this proceeding by enemies of theirs, and that he had never had a daughter at all, that there was no such person in existence. Of course there was then an end of it. At the next sessions he indicted these people for a false return, and for perjury, and they applied for a special jury. I tried the case, and it lasted, I think, about six days. There was the greatest possible conflict of testimony, on the one hand 30 or 40 witnesses speaking to the abduction and to all its circum-

stances, speaking to the existence of this young woman and to her having been a member of the family, and having often seen her, and so on. On the other hand there was a total denial of the whole abduction; an *alibi* was very distinctly proved, and a host of witnesses were called to prove that they had known this person and had known his family, and all their circumstances, and that he had never had a daughter at all. I left it to the jury. I put the question to them particularly whether they believed in the existence of this supposed abducted person, and they told me that they believed that she never had existed, and that was clearly my opinion also, and they acquitted the defendant.

2744. Were the witnesses English or Indians?—Indians.

2745. Natives?—Yes. At the next sessions I had to try the prosecutors upon a charge of perjury and conspiracy. We had the same thing over again, and it concluded with their conviction. Now that the charge was altogether fabricated from beginning to end, there can not be the slightest doubt, but it shows the devices and tricks which are there resorted to. That is not a single specimen. When such things take place, they may equally apply to charges of a capital character.

2746. (*Mr. Bright.*) From your answer to Mr. Neate's question, I presume that you consider it to be one heavy objection against Capital Punishment, that there is under the best system a liability to mistake and to convict a man who is innocent?—I think so. I think that undoubtedly there is that danger. I always felt that there was great danger of it there. I remember that when I was in Penang Mr. Carr, the Registrar of the Court, showed me a man who was working in his garden; there were many convicted Thugs who were at large in Penang upon a kind of forced labour, and this man was one of them. He told me that that man was not the real prisoner, but that some friends of the real prisoner had bribed the man who was conducting the prisoner to substitute another man for him, and he believed him to be totally innocent. He assured me from his long experience of the man that he was quite satisfied with the truth of his story.

2747. (*Mr. Neate.*) What is the nature of the highest secondary punishment in India?—It is imprisonment for life, I think, with fine and hard labour.

2748. What are the circumstances of that imprisonment, is it a very rigorous imprisonment?—I have not seen much of it. It is transportation for life; I do not think that there is imprisonment for life, but imprisonment for a long period of years; but I have seen very little of the interior of the Indian gaols.

2749. Have you specially considered the definitions of murder in the Indian code?—Yes, I have looked at them since I was summoned here.

2750. (*Mr. Waddington.*) Has your attention been turned to the explanation given at page 99 of the code, with reference to provocation, which is in these words. It is stated before that it must be grave and sudden provocation, and then comes this explanation:—"Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact?"—That would be wrong if it was not for the nature of the tribunal. Although there were a few juries in India at the time, yet the administration of justice there was to be conducted principally by men who were Judges at once of the law and of the fact. If it was to be left abroad to a jury you would have no certainty what the law was.

2751. A man must lay down the law in every case?—Yes; and as

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the decisions would not be uniform, you could not be certain whether different cases would amount to murder or manslaughter.

2752. Would it not amount to this that the question whether murder is committed is a question of fact for the jury without any direction in point of law at all ?—Yes, and no one could say before hand under which class it would fall, because no one could tell what view the jury would take of the special circumstances.

2753. Whether there was gravity and suddenness ?—Yes ; no doubt that would argue great want of foresight in the framers of this code, if they had before their minds the application of this law to a jury. But in reality I think that it would work itself out tolerably clearly, because the decision of the Judge in each instance would probably go up to the Nazamut or the higher court, inasmuch as they reviewed decisions without any appeal. They would put their judicial interpretation whether it was right or not, and that would serve as a sort of guide or precedent in future cases, and it would come round very much to the same thing as it is here. Therefore, though that may put a kind of stigma upon the code, it does not really belong to it.

2754. As it is here worded, it would not be applicable at all to trial by jury in England ?—Just so; to legislate as here with an exception, and then to have four clauses containing the substantive matter, and then five exceptions grafted upon it, would puzzle a student of the code amazingly, but it arises as I have stated from reasons for which it could hardly have been done differently. In the directions contained in Mr. Macpherson's treatise upon the code to the Judge who is applying it in the particular instance it is stated that generally speaking it would be right that the framers of a law should put into the law itself the whole definition of it, but it is said that that cannot be done here, and that the Judge who applies that section must first compare it with the directions, and then with the exceptions, and must see whether the case falls within the saving clause. That is a troublesome office, and if anything like the same principles are to be introduced into our law, it may be done by a few plain sentences of reference. Therefore, though I do not quarrel at all with the principles of this code, I think it very unwise to introduce a portion of it into the body of our law.

2755. (*Mr. Neate.*) It would be subject to the explanation in page 99, if the question of fact is to be left to the jury, either an Indian or an English jury ?—Yes ; I think that it would be introducing an element of great uncertainty.

2756. Do you think that it is possible by any definition to draw a satisfactory distinction between homicide which should be treated as murder, and homicide which should be treated as manslaughter ?—Yes, I think that it is quite possible.

2757. (*Mr. Ewart.*) Will you tell us what sort of distinction you would draw ?—I cannot do it offhand at the moment ; it requires more power than I possess. I dare say that Mr. Waddington could do it. I could do it if time were given to me, but I should be sorry to attempt it offhand.

2758. (*Mr. Neate.*) Do you adopt the description of murder in the Indian code ; is it satisfactory to you. Setting aside the question whether it is to be decided by the Judge or by the jury, is the general description or definition of murder which is contained in the Indian code satisfactory to you ?—I see no objection to it. I do not think that is a very well worded law, but I see no objection to the definition.

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2759. (*Mr. Waddington.*) You do not think it any improvement upon the English law?—I do not think that it is.

2760. Supposing that it was possible to divide murder into two classes, one of which was capital, and the rest only punishable by penal servitude for life, would you object to there being two classes of murder, or would you rather leave that which was made capital under the name of murder, and class the other under the head of manslaughter?—I should class all that was not of the gravest kind under the head of manslaughter.

2761. You would have one class of murder, leaving it to be capital, and would range all the rest under the head of manslaughter?—Yes, I think that it would be very easy to say "After the passing of this "Act no offence which has hitherto been murder shall be deemed to "be murder unless it falls under the following heads," and then shortly to state them.

2762. (*Mr. Neate.*) I presume that the Governor-General of India has the power of pardon?—Yes.

2763. Within your knowledge does he often exercise it in cases of murder?—Yes, I think so; I cannot speak to particular instances, but my impression is that it is so. I think that the Governor-General had not in my time the power of pardoning persons convicted in the Supreme Courts, but he had in the case of persons convicted in the Company's Courts.

2764. (*Mr. Bright.*) But I suppose that there must have been somebody in India who had the power of pardon?—Yes, no doubt the Governor-General had the power in the great majority of cases.

2765. (*Mr Hardy.*) Eastern experience in this matter would not help us much?—I think not, the circumstances of the two countries being so different.

2766. (*Mr. Neate.*) But upon the whole in India you are not averse to the abolition of Capital Punishment?—No; the offences in India were considerably increased in number by the code; things which were not criminal before became so. That was not from any design to augment law, but from the necessary consequence of the new general definition.

2767. At any rate you think that if it is safe to abolish Capital Punishment in England it is safer to do so in India, at least that there are stronger reasons for abolishing it in India than there are for abolishing it here?—I think so; I think that there is very little certainty there in human testimony, and that you act under many disadvantages, nor do I think that the natives of India dread death in the way that we do here.

2768. (*Lord Stanley.*) It is in fact a very common belief in India that death is less feared by the people as a punishment than what would be equivalent to penal servitude for life?—I think so; I think that they fear death very little.

The witness withdrew.

W. C. Hood, Esq., M.D.

William Charles Hood, Esq., M.D., examined.

2769. (*Chairman.*) You are a visitor in lunacy?—I am.

2770. Appointed by the Court of Chancery?—By the Lord Chancellor.

2771. How long have you held that appointment?—I have been a visitor in lunacy for two years.

2772. Will you state to the Commission what office you held pre-

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viously to that time?—For ten years previously I was the resident physician to Bethlehem hospital, for two years before that I was medical superintendent at Colney Hatch asylum, and for five years before that I was medical superintendent of a large private asylum in the west of England.

2773. Have you had under your charge criminal lunatics?—During the time I was at Bethlehem criminal lunatics were under my charge.

2774. (*Mr. Waddington.*) What was about the number?—About 250.

2775. Male and female?—Male and female.

2776. (*Chairman.*) Have you formed any conclusion upon the subject of Capital Punishment generally, as to whether it should be abolished or retained?—I have not given it that consideration which would be necessary before I could offer any remarks to the Commission upon it.

2777. (*Lord Stanley.*) Among the large number of insane criminals whom you have had under your charge, have you known many cases in which the insanity, doubtful at first, became developed afterwards?—I have known some cases.

2778. Cases in which a jury or the Home Office might reasonably have entertained a doubt of the fact of insanity, but where it has become manifest after a few weeks?—Cases in which the disease progressed while under treatment. Perhaps I should say that they were cases in which the public did not sympathize more than the Home Office with the verdict of acquittal on the ground of insanity. There is one particular case which I remember, where as time went on the disease most clearly showed itself, and the woman not only lived under my care for several years as a confirmed lunatic, but died of very advanced disease of the brain.

2779. (*Mr. Waddington.*) What woman was that?—Her name was Brough, she killed many children.

2780. (*Lord Stanley.*) Was Celestina Sommers under your care?—No.

2781. (*Mr. Neate.*) Did you examine the brain of the woman Brough?—Yes.

2782. And was there advanced disease?—There was advanced disease in her brain.

2783. (*Mr. Bright.*) Would you say that at the time of the commission of the murder she was insane, or would it not be reasonable to suppose that, after having killed several children, looking back upon such a tragedy might have had the effect of rendering her insane?—I think not. I have now no doubt that she was insane, and I had no doubt at the time that the public would be satisfied eventually that the verdict was a just one.

2784. (*Mr. Neate.*) Did she ever express any remorse for having killed her children?—None whatever; on the contrary, she anticipated the time when she might be discharged from custody.

2785. (*Mr. Ewart.*) Did you ever know a person executed in whose incipient insanity you had reason to believe?—No.

2786. Have you given evidence in such cases?—I have had many such cases under my care, and I have been consulted in such cases and have consequently given evidence.

2787. Do you not consider that there is a conflict between the medical and the legal definition of insanity?—Lawyers and doctors must necessarily be in some antagonism, because one deals only with

facts, and the other has often to decide upon symptoms which indicate the probability of disease.

2788. (*Mr. Neate*). Did you attend the general meeting of the Association of Medical Officers of Asylums for the Insane in 1864?—I did not.

2789. Have you read the resolution to which they came?—Yes; I am an honorary member of that association, and the proceedings were sent to me.

2790. Do you concur in that resolution?—I do.

2791. (*Chairman.*) The resolution is the following: "That so much "of the legal test of the mental condition of an alleged criminal lunatic "as renders him a responsible agent, because he knows the difference "between right and wrong, is inconsistent with the fact well known "to every member of this meeting, that the power of distinguishing "between right and wrong exists frequently among those who are "undoubtedly insane, and is often associated with dangerous and "uncontrollable delusions." Do you agree with that resolution?—I quite agree with it.

2792. That a man may be perfectly aware of what is right and wrong and still not answerable for his actions?—Not responsible.

2793. (*Mr. Waddington.*) Not criminally responsible?—Not criminally responsible.

2794. (*Mr. Ewart.*) Was not the resolution unanimously agreed to?—I was not present at the meeting.

2795. (*Mr. Neate.*) To recur to your experience of criminal lunatics, have you ever known any who have been acquitted on the ground of insanity, or pardoned on the ground of insanity, in whom you could detect no signs of insanity?—Yes, I have known some.

2796. Many?—Several cases.

2797. Insanity has not developed itself in them afterwards as far as you have known?—No. I have not recognized insanity at all; there has been neither the nucleus nor the development of it.

2798. A man might be perfectly sane when he came in, and become insane from the fact of being there, might he not?—That would have induced me to reply to your question differently.

2799. Either at the time when they came in, or during the time that they have been under your observation, have there been many criminal lunatics in whom you have detected no trace of insanity?—Yes.

2800. (*Lord Stanley.*) Do you look upon sanity and insanity as a question of degree. In your opinion are there persons so near the dividing line between the two that it is difficult to say with certainty to which class they belong?—I am taking insanity now as a positive case; I am not taking degrees of eccentricity, or peculiarity, where there is no evidence of insanity.

2801. Is there in every case a well defined line of demarcation between the two, or does extreme eccentricity and weakness of mind shade off by imperceptible degrees into actual insanity?—There is no doubt that the line is very fine in some cases.

2802. (*Mr. Neate.*) Do you admit that there may be insanity not capable of being treated by medical remedies?—Certainly not capable of medical treatment, but subject to moral treatment.

2803. (*Mr. Hardy.*) The resolution which was passed by the Association of Medical Officers is a negative one; it says that a certain legal definition of insanity is wrong, have you, either alone or with other medical officers, come to any conclusion as to what ought to constitute insanity?—I have not.

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2804. (*Mr. Bright.*) Do you think that anybody could ever put it into words?—I think that every case must rest upon its own peculiarities. I believe that one of the Judges, if not more, has laid down the rule that to constitute insanity there must be a delusion existing in the man's mind. I think that the Lord Chief Baron holds that view.

2805. Does he mean a delusion with regard to the particular crime, or some delusion which does not bear upon it?—Some delusion.

2806. (*Mr. Waddington.*) Upon some matter of fact?—Yes.

2807. (*Mr. Bright.*) Supposing that a man thought that he was heir to the crown of England, and persisted in it, but was apparently rational in other things, and committed a murder, would that be held in your view to be insanity sufficient to remove his responsibility?—Most certainly it would in my opinion.

2808. (*Mr. Waddington.*) Was McNaghten under your care?—Yes, for 10 years.

2809. Was he not undoubtedly insane?—Undoubtedly.

2810. Is he alive?—Yes.

2811. Is he at Broadmoor?—I am not quite sure, I think that he was too ill to be removed. I have not seen him at Broadmoor.

2812. How have McNaghten and men who have been kept for that period of time, namely 10 years, borne the confinement?—Physically McNaghten bore it very well, but his mind gradually decayed, not from the confinement, in my opinion, but from the ordinary course of the brain disease.

2813. (*Mr. Neate.*) You conceive that he had a special form of brain disease?—Yes.

2814. Did he ever express any regret for what he had done?—I do not think that he realized at all the crime which he had committed.

2815. (*Mr. Waddington.*) With respect to those persons who have been acquitted upon the ground of insanity, and who have shown no symptoms of insanity afterwards, have you had some of them under your care for a great many years?—Yes.

2816. (*Mr. Bright.*) What length of time is the longest?—A man named John Atkinson was tried at York in December 1858 for murder, he was acquitted on the ground of insanity.

2817. (*Chairman.*) Did you discover any symptom of insanity in him?—He was acquitted on the ground of insanity, I apprehend, on account of the medical evidence. Three medical gentlemen of considerable reputation formed an opinion that he was of unsound mind after two hours' interview with him. He remained under my care for five or six years, and he during the whole time did not show one symptom of insanity.

2818. Where is he now?—At Broadmoor.

2819. (*Mr. Waddington.*) I think that he murdered two or three persons?—I think that he murdered a young girl to whom he was engaged; she had jilted him, or something of the kind.

2820. (*Mr. Ewart.*) Was there a Mr. Smith who murdered his wife and who was confined?—Yes.

2821. Has he quite recovered?—No, I think not.

2822. (*Mr. Neate.*) Have any criminal lunatics been discharged within your knowledge?—To what class of criminal lunatics do you refer? There are three classes; there are the insane convicts, who on being insane are removed from the different convict prisons; there are those who are found insane upon arraignment, and therefore are not tried; and there are those who being tried are acquitted upon

the ground of insanity, and are ordered to be confined during Her Majesty's pleasure.

2823. Are those who are confined during Her Majesty's pleasure ever discharged ?—Yes.

2824. After murder ?—Yes.

2825. (*Mr. Waddington.*) Has not that been in the case of puerperal murder ?—Yes ; and some others.

2826. In the case of puerperal murder it would be merely temporary insanity, which would not justify confinement for the remainder of life ?—In my opinion, in the case of puerperal mania, a discharge is scarcely justifiable until the woman has ceased child-bearing.

2827. (*Lord Stanley.*) Have you ever had to deal with another class of cases, that of men driven to temporary insanity from a long period of intoxication, and in that state committing murder, and afterwards becoming sane when the drink has been withdrawn from them ?—Yes ; and who have become sane in prison before admission to the asylum.

2828. What are you to do with those cases ?—That is the greatest difficulty which we have to deal with in the management of criminal lunatics. They are not convicts, and consequently they cannot be returned to prison, and the Home Secretary very properly hesitates to recommend Her Majesty to discharge a man who has once committed murder.

2829. Especially as I suppose in many of those cases there is a strong constitutional tendency to intoxication, and therefore the man is very liable to be placed in the same situation again ?—Quite so.

2830. (*Mr. Waddington.*) Was not there a man named Johnson who had a very long confinement, who was acquitted upon the ground of insanity ?—Yes.

2831. For 20 years ?—I think quite 20 years. It was before I was appointed to Bethlehem ; but he was for 10 years under my care, and I saw him recently at Broadmoor.

2832. How has he borne his very long confinement in point of health ?—Not favourably ; but I think that I can account for that. His hopes have been too often unfairly and improperly raised, without any probability of their being realised.

2833. (*Mr. Bright.*) Do you recollect the case some years ago of a man who had been discharged, supposed to be cured, and who committed a murder very suddenly at the house of a clergyman by killing a servant one morning ?—Yes.

2834. Had he been convicted of murder before ?—He had been an ordinary lunatic. He had been confined in the usual manner as a lunatic in a private asylum near Bristol.

2835. Then he had not committed any crime before ?—I think not.

2836. But he was discharged, supposed to be cured, and then killed this poor girl ?—I think 24 hours after his discharge.

2837. (*Mr. Waddington.*) I think that no criminal lunatic who has been discharged has ever committed any crime afterwards ?—No. I can give the Commissioners a case where long intemperance brought on what was considered to be insanity. John Paine, an expert thief, well known to the police authorities of London and the west of England, was associated with a gang of similar characters in the metropolis during the summer of 1857, and being seized with delirium tremens was taken charge of and placed in the Westminster workhouse. He there committed murder, for which he was tried and acquitted on the ground of insanity. A warrant of Her Majesty provided for his safe custody, and he was removed to Bethlehem hospital. At the

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time of his reception he was sane, and showed no symptom of insanity during his residence. An ordinary lunatic asylum is no place for such a character, who on eleven previous convictions for felony had been as many times confined in prison. His vicious tendencies are unimpressible by either advice or kindness; yet, though perfectly sane, the doors of every prison are closed against him, and he must remain a tenant of the lunatic asylum, where he produces constant anxiety to those who have charge of him. Probably some of the honourable members of the Commission may have read the account of Broadmoor in the "Times," and his case was very graphically put by the reporter.

2838. (*Mr. Hardy.*) Do you consider that a delusion on one subject entirely unconnected, for instance, with the crime renders a person irresponsible for it?—I am disposed to hold a man irresponsible who has a distinct delusion.

2839. On any subject?—Yes.

2840. (*Mr. Ewart.*) You would allow that delusion to affect his general character so as to make him irresponsible for his actions?—Yes.

2841. (*Mr. Hardy.*) Would that extend to his powers of making a will?—I believe that at the present time a lunatic is permitted to make a will, provided it is a simple and straightforward statement. I have witnessed wills by lunatics in a lunatic asylum.

2842. You think that they have a power of acting on general subjects irrespective of the delusion?—A lunatic making a will might leave his property to his father or his mother, or his wife, or his family, and that I think would be a reasonable disposition of his property; but if he took what in my opinion would be an unreasonable view, and left his family beggars, and distributed his money in what we might call an unwise manner, I should not recognize the propriety in that individual case of a lunatic making a will.

2843. (*Mr. Hunt.*) Then you would make the disposition itself the test?—I would make the act a sane or an insane act; in that individual case it would be the disposition of his property.

2844. (*Mr. Neate.*) Do you think that any man who is properly a subject of confinement for life, not for crime, but under the Court of Chancery for instance, can ever have so perfectly lucid an interval as to be entrusted with liberty of making a will without any restriction?—If you remove the last three words "without any restriction," I will answer the question in the affirmative.

2845. You do not admit a perfectly lucid interval in the case of a lunatic?—That entirely depends upon the form of insanity from which he is suffering.

2846. (*Mr. Hardy.*) But I understand you to say that if a man is insane on one subject, however unconnected with the crime which he commits, you would give him the benefit of that insanity and make him irresponsible for the crime?—Yes, speaking of the matter generally; if he has a delusion upon one point, it is very evident that his other intellectual faculties must sympathize, and consequently he cannot be held responsible. The intellectual faculties are not so many separate and independent faculties but act in harmony with one another.

2847. (*Mr. Bright.*) Have you not found in your experience that insanity is paroxysmal, and that men in the spring of the year, or in the autumn of the year, or in very hot weather, or under some conditions, will be insane, but that during the rest of the year they will be apparently as sane as other people?—That has not been my experience.

2848. Have you not known men who for nine months in the year would go on with perfect steadiness, and would read and write and talk, and would never ramble into anything foolish, and then at some time during the other three months might throw themselves out of a window ?—That has not been my experience.

2849. (*Mr. Waddington.*) With respect to persons who have been acquitted on the ground of insanity, and who turn out to be sane, has a great length of confinement any tendency to produce insanity in them ?—I do not think that it has been so in my experience.

2850. You have not observed it ?—No.

2851. Would a very long confinement in a prison for 20 years for instance have generally speaking a tendency to produce insanity in the persons confined ?—I think that you would find the mind would break down in some cases if there was no hope. I think that hope is the essential element for sustaining the mind ; a few cases would break down, but it is perfectly possible that they would break down even under excitement out of the prison.

2852. (*Mr. Hardy.*) They would be persons with that tendency ?—Yes. With regard to a previous question put by Mr. Bright, I would observe that there are many cases of insanity coupled with epilepsy where the epilepsy is recurrent in the manner he has spoken of, but I do not know any case where the insanity or the mental disease is entirely removed, and returns at certain intervals. There are many cases on record, and cases which come under our daily experience, of recurrent or intermittent mania, and they are the most difficult cases to treat.

2853. (*Mr. Bright.*) With regard to the question of punishment, which this Commission is appointed to consider, looking at the great difficulty of the question of insanity in connexion with it, does it appear to you that it would be very much simplified if Capital Punishment could on other grounds or on that ground be abolished. If it were the question of what is now called a secondary punishment, such as imprisonment with or without hard labour, or transportation, or anything but death, would not a great difficulty as to the administration of the law be removed ?—I think that if there was no punishment by death, fewer persons would be acquitted on the ground of insanity.

2854. You have for many years been examined in courts of justice in cases of this sort ?—Yes.

2855. And you are deliberately of opinion that if Capital Punishment were abolished there would be a larger number of convictions and of punishments following the crime of murder ?—Yes ; I do not form that opinion merely from my attendance in courts of justice, but from ordinary social intercourse with the world.

2856. (*Lord Stanley.*)—I suppose that you put it in this way, that if the punishment were penal servitude for life instead of death, the jury would attach very little importance to the question of insanity, because they would say, "If the man is insane it will be found out "in gaol and then he will be removed"?—That is a better answer than I gave myself.

2857. (*Chairman.*) What description of punishment could a man undergo for life with no hope of any release without being driven to insanity ?—I think that the principal way to avoid any chance of insanity is to keep the mind well occupied, but the separate system in the convict prisons, so far as I know, is very different from that which would occupy their minds, not cheerfully, but healthily.

2858. In what method would you occupy their minds ?—I should occupy their minds in useful pursuits, agricultural labour, and

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trades, anything which was useful, and which, without perhaps elevating the mind much, would keep it in a healthy condition.

2859. Supposing that to be carried out, would not those men be in a better condition than convicts sentenced to a short period of confinement?—No, inasmuch as their period would be for life, and the sentence of the others would terminate within a certain time.

2860. You would keep them in association?—A certain amount of association, not large association.

2861. (*Mr. Waddington.*) I suppose that the harmless lunatics are allowed to associate with each other?—All the lunatics associate; the classification is very limited.

2862. (*Mr. Ewart.*) Would you in any case cut off a man from all society whatever, all association with the chaplain of the gaol?—Certainly not.

2863. Therefore he would always have some degree of association with his fellows?—Yes.

2864. (*Mr. Waddington.*) Are not some of these criminal lunatics most desperate and dangerous subjects?—Yes.

2865. Have they ever committed assaults upon the keepers?—Yes, frequently.

2866. Have they ever committed a murder upon them?—No actual murder; one man attacked one of the attendants and severely wounded him, and I thought for some time that he would have died, his life was in danger; the same man killed a warder in Millbank prison while under sentence of penal servitude.

2867. (*Mr. Bright.*)—Was there not a case not long ago in which one of the inmates was killed by a warder?—I do not know what occurs in the asylums.

2868. (*Mr. Waddington.*) — There was nothing of the sort at Bethlehem?—No.

2869. (*Mr. Bright.*) Do the criminal lunatics associate much together?—They associate in their own ward. The ward contains, I think, from 25 to 30.

2870. Have you ever observed, or do you know from any source, that they discuss any of the matters which have brought them together, or their crimes, or their trial, or anything connected with their past life?—I believe that the history of each is known to each.

2871. (*Mr. Neate.*) So far as they know it themselves?—I am referring to those who are sane.

2872. (*Mr. Hunt.*) Do you inspect Broadmoor officially?—I am one of the Board of Supervision for Broadmoor.

2873. We have understood that Broadmoor is confined to criminal lunatics?—Entirely.

2874. Can you give us an account of what the treatment is there; first of all, as regards confinement, have they each a separate cell?—I think that about 30 per cent. have single sleeping rooms, and that the others sleep in dormitories, containing from 5 to 15 beds.

2875. (*Mr. Bright.*) And with warders in those rooms?—In some of the large dormitories a warder sleeps in a small room adjoining with a window communication.

2876. (*Mr. Hunt.*) What means have they of communicating with one another. Are they divided according to their state of mind, or according to the crimes which they have committed?—According to their mental state as much as possible, and where the inmate is sane some attention is paid to his previous life and habits.

2877. What are their means of association with one another?—They are perfectly free.

2878. In the case of those who have separate sleeping cells what means of association have they ?—They have a common dining room, sitting room, library, billiard room, and garden.

2879. They have a great many means of recreation ?—Yes.

2880. (*Mr. Waddington.*) It is not in any respect a penal confinement ?—Not at all.

2881. (*Mr. Hunt.*) Neither as regards occupation, nor as regards diet ?—That would depend very much upon the previous history of the individual, because under the influence of insanity I might to-morrow be a criminal lunatic, and then it would be a great deprivation to me to give up my home comforts, but it would be rather a boon to a man walking the streets to find that he had a good dinner every day at 1 o'clock and a comfortable bed, and books to read.

2882. Is the diet altered according to the previous life of the prisoner ?—No, there is a common dietary for the house.

2883. A gentleman and a labourer would be put on the same diet ?—Yes. It is left to the discretion of the medical officer whether or not any additional comforts should be granted.

2884. That is with regard to the health of the patients ?—It is with regard to their happiness as well as to their physical health.

2885. As I understand generally, with the exception of their not being at large, life is made tolerably comfortable to them there ?—I believe that they are comfortable as it is possible to make them.

2886. It was set up for Townley I believe at his trial, that his was a case of moral insanity. Do you think that there is such a thing as moral insanity, so as to make a man irresponsible for his actions ?—I think that it is very dangerous to recognize such a disease.

2887. (*Mr. Waddington.*) Is not that the very criterion which the Judges now lay down, would not moral insanity be an incapacity to distinguish right from wrong ?—The Judges consider that the want of power to distinguish between right and wrong is the only evidence of insanity, and not the want of responsibility.

2888. Is not the want of capacity to distinguish right from wrong what you call moral insanity ?—The want of power to distinguish right from wrong may arise from disease or it may arise from vice.

2889. I am not speaking of what it arises from, but is not that the form of insanity which you call moral insanity ?—It is what is generally called moral insanity.

2890. (*Mr. Hunt.*) Is there not a considerable difference between being able intellectually to distinguish between right and wrong, and that sort of depravity of the moral sense which refuses to recognize the difference ?—Yes.

2891. (*Mr. Waddington.*) Do you call the latter insanity at all ?—No, it is moral depravity, I think.

2892. (*Mr. Hunt.*) Do you recognize such a state of moral depravity as to make a man irresponsible for his actions ?—No.

2893. Do you consider that insanity is a disease of the brain ?—Do you mean an organic disease of the brain ?

2894. Yes ?—Not always.

2895. Is it possible for a man to have a delusion and yet that if his brain were examined after death it would appear to be in a perfectly healthy state ?—Yes.

2896. (*Lord Stanley.*) May it not in your opinion happen that the brain is in an absolutely healthy condition, or that the present state of scientific knowledge does not detect any disease ?—It may be that there is no evident disease of the brain.

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2897. (*Mr. Ewart.*) But is there latent disease of the brain ?—I cannot say that ; that is going rather beyond my province.

2898. (*Mr. Hunt.*) I suppose that in a great many cases the brain would show decided symptoms of disease ?—In many cases it does.

2899. (*Mr. Bright.*) You think that there would be more persons convicted and punished if Capital Punishment did not exist. On the other hand is it your opinion that persons are occasionally hanged who upon the principles which you have laid down might be held to have a disturbed intellect, and therefore not to be fairly responsible to the law ?—I have not known of any such cases.

2900. (*Mr. Ewart.*) I think that you have mentioned cases of incipient insanity where the insanity was developed more afterwards ?—Yes.

2901. In those cases it probably may have happened that persons with incipient insanity have been executed ?—I have not known such a case.

2902. (*Mr. Hunt.*) I suppose that such an excitement as the trial might have a tendency to produce the disease ?—The disease I suppose would exist before the plea of insanity was set up.

2903. I suppose that any strong excitement would be likely to develop any latent disease of that sort ?—It would be likely to do so.

2904. (*Mr. Neate.*) It might have the opposite effect ?—I suppose that it might have either one or the other ; it is impossible to say.

2905. The disease is so inexplicable ; might it not happen that a man who you say was decidedly insane, if he had to go into battle would have coolness and determination ?—But he would be insane nevertheless.

2906. The consciousness of having to rally his faculties and his self-command might steady him for a time ?—Being engaged on another subject he might hide his delusion.

2907. (*Mr. Waddington.*) I believe that it is by no means uncommon that insane persons are perfectly aware of their delusion, and are able to conceal it for any particular purpose which may be required, is not that so ?—They are aware that they are considered to have delusions, and to be suffering under insanity, and they can in that condition often hide and secrete their delusions.

2908. (*Chairman.*) Does not it also happen that persons who are subject to insanity are aware when the fit is coming on ?—Yes, in some cases.

2909. And they have been known to put themselves under the care of some medical man ?—Yes.

2910. (*Mr. Hardy.*) When you are speaking of the responsibility or the irresponsibility of the insane, do you make a distinction as to whether the punishment be capital or a secondary punishment ?—I am referring to the responsibility of the insane quite independent of punishment.

2911. Then would you excuse a person with one delusion from the consequences of any crime whatever the punishment be ?—I think that that is going rather to the other extreme.

2912. For instance, supposing that a person under a delusion committed a theft or a burglary, would you hold that, in consequence of that clear and known delusion, he was irresponsible for that particular kind of crime ?—I should be careful that he did not commit a similar act again.

2913. You would acquit him on the ground of insanity, and shut him up ?—Yes.

2914. Do you consider that you could enforce responsibility by a course of punishment, or would you acquit him and shut him up, as an insane person?—I should acquit him and shut him up as an insane person.

2915. Whatever be the delusion and whatever be the crime?—If you once establish irresponsibility you must not bring punishment to bear, and therefore prevention must take the place of punishment.

2916. (*Mr. Waddington.*) In a slight case it is not probable that the defence of insanity would be set up, because the sentence is the same, namely, to be detained during Her Majesty's pleasure?—It is very often so.

2917. Is it not always so that whenever a person is acquitted on the ground of insanity, even if it is for common assault, the sentence is to be kept in confinement during Her Majesty's pleasure?—Yes.

2918. The same as in a capital case?—Quite so.

2919. Therefore a prisoner in a case of assault would be very ill-advised to set up the defence of insanity? On one occasion the defence of insanity was set up, and Mr. Baron Martin who was trying the case recommended the plea to be withdrawn; the plea was withdrawn, and the man undoubtedly of weak mind had two years' imprisonment. If the plea had been carried out, contrary to the Judge's advice, he would in all probability have been confined in a lunatic asylum for life.

2920. (*Mr. Neate.*) From your observation of trials for murder have you seen many cases in which you were not satisfied with the conviction. From reading or hearing them have you seen many cases in which you think that the defence of insanity has been improperly overruled?—No, I have not.

2921. (*Mr. Hunt.*) With regard to the inmates of Broadmoor, when they are cured they are released, are they not?—The insane convicts, those who become insane during their penal servitude, and are removed from their convict prison to the Broadmoor asylum, on becoming sane are returned to the prison to work out their sentence.

2922. But supposing that their previous sentence has expired from lapse of time, and that they are cured, they would, I suppose, be released?—Then they would be discharged.

2923. But in the case of prisoners who are ordered to be kept during Her Majesty's pleasure, are they ever released when cured?—In a few instances they have been discharged.

2924. In the case of persons who you say are not only insane but who have been acquitted as insane, what is done with them?—They remain. I do not know of any such case having been discharged.

2925. They will be detained for life?—They will in all probability be detained for life.

2926. (*Mr. Waddington.*) That is in murder cases?—Yes.

2927. (*Mr. Hardy.*) With regard to those who are discharged, is it always on account of their being cured, or is it with the view of putting them under the charge of their relations in some other sort of confinement?—It is not to place them in any other sort of confinement. I think I may say that the Home Secretary is always anxious to know that a certain amount of surveillance or care will be exercised over them for some time.

2928. (*Mr. Waddington.*) That I think is generally done upon the expression of the medical superintendent, not only that they are sane but that their insanity is not likely to recur?—That there is no probability it will recur.

2929. That in his opinion there is no reason to believe that it will

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recur ?—I believe that that is the way in which the certificate is generally worded.

2930. (*Mr. Hunt.*) Do you generally find the inmates of Broadmoor exceedingly anxious to be released ?—I have only had two years' supervision of Broadmoor, but many of the same patients were under my care at Bethlehem, and therefore I can speak of them.

2931. Do you find that they resent the confinement ?—Some do very much.

2932. Taking the case of those who are really insane, and of those who are only shamming insanity, which class resents the confinement most, can you divide them at all in that way ?—No ; it depends more upon the individual character than upon the mental condition.

2933. Do you consider that the warders in these criminal lunatic asylums are in great peril?—Some of them are ; it is a very disagreeable post to hold.

2934. They carry their lives in their hands ?—In some cases they do.

2935. Do you consider that a warder in a criminal lunatic asylum runs a greater risk than in another lunatic asylum ?—Yes.

2936. For what reason ?—Because the tendency of the criminal lunatic is frequently to acts of personal violence.

2937. In the case of other lunatics, are not many of them shut up because they show a tendency to violence ?—Some of them are ; they show a tendency to violence, to extravagance, or to some absurdity ; there are many causes which necessitate a lunatic being shut up in an asylum.

2938. But you find more violent patients in a criminal lunatic asylum than in another lunatic asylum ?—Yes, but these violent patients are not all patients who have committed murder ; many of them are convicts, men of very depraved moral habits, who come from the convict prisons, and who are as bad as they can possibly be.

2939. (*Chairman.*) Are they men whose health had broken down under the confinement ?—There are a few cases where I have no doubt that the confinement has broken down the health of the men, but they are nearly all curable cases.

2940. How long are convicts now kept in Pentonville ?—I am not aware.

2941. (*Mr. Hunt.*) Do you find that when convicts are sent from penal settlements to Broadmoor they are pleased with the change ?—My experience of Broadmoor is very limited.

2942. They used to be sent to Bethlehem ?—Yes.

2943. Do you find that convicts sent from penal settlements on becoming mad are pleased with the change on coming into a lunatic asylum ?—They are not only pleased but they feign insanity to get there. Bethlehem Hospital went by the name of "The Golden Bank." They feign insanity to get away from the prison discipline, and from the severity of penal servitude, to a position where it was no punishment, and where much was done for them.

2944. Have you found a great many cases of persons who you think have feigned insanity ?—Yes, among the convicts.

2945. (*Mr. Waddington.*) Was suicide at all common among the criminal lunatics in your time, during the ten years of your experience ?—I think that there were four cases during the ten years.

2946. Out of a number of 250 ?—Yes.

2947. (*Mr. Hunt.*) Have you had any cases of violent assaults upon prison officers ?—Yes.

2948. Were those cases of assaults by persons who you consider

were really insane; or by those who were merely shut up as insane?—They were in both classes. *W. C. Hood, Esq., M.D.*

2949. Would you say more in one than in the other?—I am not prepared to say. 10 Mar. 1865.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Saturday, 11th March 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
DR. LUSHINGTON.
MR. JUSTICE O'HAGAN.
HORATIO WADDINGTON, ESQ.
WILLIAM EWART, ESQ., M.P.
GATHORNE HARDY, ESQ., M.P.
GEORGE WARD HUNT, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Right Hon. JAMES A. LAWSON examined. *The Right Hon J. A. Lawson.*

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2950. (*Mr. Justice O'Hagan.*) You are Attorney-General for Ireland?—Yes.

2951. And you have been Solicitor-General for Ireland for several years?—Yes.

2952. Before that you were Law Adviser at the Castle in Dublin?—Yes.

2953. Altogether, how many years have you had to do with the criminal business of Ireland in an official position?—About eight years.

2954. Continuously?—Yes. And before that time I was on circuit for a great many years; and I attended to Crown prosecutions there.

2955. Did you defend prisoners at all?—No; I have generally been prosecutor.

2956. Since you became Solicitor-General, have you been engaged on some special Commissions?—Yes.

2957. And in prosecuting in a number of capital cases?—Yes.

2958. Have you directed your attention to the question whether Capital Punishment ought to be retained or abolished?—I have for a considerable time.

2959. Having regard to your own experience and consideration of the question, what is your opinion upon that subject?—I am of opinion that it ought to be abolished.

2960. Will you state shortly to the Commission the reasons upon which that opinion is grounded?—I think that when the idea is abandoned of maintaining Capital Punishment on the ground of retaliation, or of the propriety of sacrificing one life for another, the only ground on which it can be maintained is that its maintenance is essential for the security of the lives of Her Majesty's subjects; and I think that it lies upon those who advocate its maintenance to make out satisfactorily that its continuance is essential to the preservation of life

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amongst the other members of the community. I do not believe that that can be shown to be the case. I am not aware that there are any statistics which can throw light upon the subject ; and as far as *à priori* reasoning goes, it is very difficult to argue about the matter, because there is so much uncertainty in entering into the question of what the motives or the calculations of the person are who is intending to commit a certain crime. It is very hard to say that the man who intends to commit murder deliberately reasons with himself whether he is likely to be convicted, and whether he is likely to suffer death. I should rather think that in the great majority of cases no such reasoning takes place. But the question whether Capital Punishment is essential in order to prevent the commission of the crime of murder can, I think, only be judged of by looking at analogous cases. Now we know from the history of our criminal law that Capital Punishment was awarded for a great many crimes; it is now limited to the case of murder. Take the case of forgery—that was a capital offence for a long time, and it was believed at one time that the abolition of the punishment of death would endanger commercial security ; the reverse has been found to be the case. In no instance that I am aware of has the abolition of the punishment of death led to an increase of the crime for which it was awarded as a punishment. Take the case of highway robbery. When Capital Punishment was awarded for highway robbery, highway robberies were very frequent ; they are now comparatively rare. Rape is another offence which was at one time capital; and it is not the fact that since Capital Punishment was abolished the crime of rape has at all increased. I would say, therefore, that, applying that analogy, we have no reason to expect that the abolition of Capital Punishment in cases of murder would lead to an increase in the crime of murder. Now, it may be said that there is a difference between the character of the offences which I have mentioned, and of the offence of murder ; but I think that the argument is rather *à fortiori* in the case of murder, because it is a much graver offence ; it is generally committed under the influence of some overpowering passion or temptation ; whereas an offence like forgery is a deliberate one, and into which those elements do not much enter ; and if Capital Punishment is not found necessary in order to prevent forgery, which is a minor offence, I cannot see why it should be necessary in order to prevent the commission of murder. My belief is that Capital Punishment is not necessary at all in order to preserve the security of human life ; and although it is, of course, a punishment more dreaded than any other, yet I think that the substitution of another punishment, which would be more certain to follow upon the crime, would be equally deterrent with Capital Punishment in the case of murder.

2961. You do not think that Capital Punishment would be greatly more deterrent than a secondary punishment even in the case of murder ?—I do not.

2962. What would you substitute for Capital Punishment ?—I think that all murderers should be imprisoned for life, and as a class by themselves, and kept altogether apart from every other prisoner. There should, in my opinion, be a separate place of confinement for them. As soon as a man was convicted of murder, I think that he should be immediately, without seeing any friends or relatives, removed from the dock to this prison, and there kept. I do not enter into the details of what kind that imprisonment should be ; but I think that he should be completely excluded from all communication with the outer world, and that he should be immured there for the rest of his life.

2963. And in your opinion that would be as deterrent in the case of murders as Capital Punishment?—I think that it would.

2964. Do you apply that observation to Ireland as well as to England,—take the case of agrarian murder which has unfortunately occurred, though it is not now prevalent?—Agrarian murder has been prevalent to a considerable extent in Ireland, and it is frequently committed by a person who is hired, or employed, or deputed for the purpose, who has no interest himself in committing the murder but is simply carrying out the orders of others. Now, one would suppose that in a case of that sort the fear of death ought to deter, but as a matter of fact it has not been so, and those crimes have been common; the persons who commit them rely upon escaping, they are quite aware of the difficulty of obtaining a conviction in a capital case; and my belief is, that if punishment of another character were more certain to follow upon the crime, it would be more deterrent than that of death, from which a person generally calculates that he will be able to escape.

2965. You, I believe, have had to prosecute in a great number of agrarian cases?—Yes.

2966. You were upon the Leinster Circuit at Tipperary?—Yes.

2967. A great number of those cases prevailed there from time to time?—Yes. I have seen a great many acquittals in cases where I felt perfectly certain that the result would have been a conviction, if the punishment had not been death.

2968. On the whole, having regard to your own experience, you do not think that the abolition of the punishment of death would produce any increase in the crime of murder?—I do not; I am not aware of any instance in which a crime has been increased by abolishing the punishment of death, and substituting some other punishment for it.

2969. You have spoken of the probability that the infliction of a secondary punishment would produce greater certainty of conviction, is that your opinion, formed upon a large induction of instances?—Yes. My experience is that both Judges and juries, generally speaking, are reluctant to discharge their duty when the result of the case which they are trying involves death.

2970. (*Lord Stanley.*) You are speaking of Ireland?—I am.

2971. (*Mr. Justice O'Hagan.*) And of your own experience?—Yes.

2972. (*Mr. Hunt.*) Are you speaking of agrarian murders, or of murders in general?—I am now speaking of murders in general, and my experience has been that the result of Capital Punishment has been, in a great many instances, to prevent both Judges and juries from discharging their duty in the same manner as they would have discharged it if the punishment had not been death.

2973. (*Mr. Justice O'Hagan.*) Do you remember any particular cases which would illustrate that general statement?—Yes; I remember a case in which a man was tried for murder, and the jury acquitted him upon a suggestion that although he was shown to be close to the place where the murder was committed, possibly some other unknown assassin might have been lurking in a ditch near the place (of which there was not a particle of evidence), and that he might have committed the crime. Now, in an ordinary case, I apprehend that such an argument as that would not weigh with the jury at all, but I find that the juries, in capital cases, are anxious to catch at any theory at all which will enable them to acquit the prisoner, and Judges attach weight to arguments which, if they were addressed to the court in a civil case, or in a criminal case where the punishment was not death, would scarcely

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be considered worthy of being submitted to the consideration of a jury at all.

2974. (*Mr. Waddington.*) Was the murder case which you have mentioned an agrarian case?—It was.

2975. Is there any sympathy felt by the jury, or a portion of them, with a prisoner who is tried for an agrarian murder?—No; the jury, I think, scarcely ever feel a sympathy with the prisoner in agrarian cases; some part of the peasantry may do so, but I think that it rarely happens that you will find upon the jury persons who sympathize with an agrarian crime. No doubt it very often happens that there are persons upon the jury who from fear of consequences to themselves, are deterred from doing their duty.

2976. (*Mr. Justice O'Hagan.*) But in your experience during the special commission in the year before last, and in other cases, you do not think that there is any sympathy with the accused?—I think not amongst jurors.

2977. (*Lord Stanley.*) But there has been intimidation?—Yes; perhaps I ought not to say intimidation, it would be impossible to prove it; but there has been fear on the part of the jury of consequences to themselves if they discharged their duty with firmness.

2978. (*Mr. Justice O'Hagan.*) Have you considered the existing state of the law in reference to medico-legal cases in which insanity is set up?—Yes; I think that another great evil resulting from Capital Punishment is the disposition, both of Judges and of juries, to find a person insane who has committed murder. Medical men invent theories for the purpose of preventing the application of Capital Punishment, and juries are very anxious to catch at those theories, and to pronounce a man insane. I remember a case to have occurred in which a person, in the superior ranks of life, deliberately shot a bailiff who was making a distress in his house; he was in his perfect senses during the entire day, and never had been insane before, and immediately after he committed the act he used expressions which showed that he was sorry for it, and that he was quite conscious that he had done a wrong thing.

2979. (*Lord Stanley.*) Was not the bailiff in the house during the greater part of the day before?—Yes.

2980. And had he not been upon perfectly good terms with the man until immediately preceding the act?—Yes; the defence relied upon for the prisoner was, that in a moment of temporary insanity he had committed this crime. It was clear that he was sane the moment before he committed the crime; it was clear that he was conscious, immediately after committing the crime, that he had done what was wrong, and yet the jury acted upon the notion that the man had been seized with a sudden fit of insanity, and that under the influence of that he had committed the crime. Now the result of cases of that sort is very injurious to the community. When a person is so acquitted, on the ground of insanity, he is sentenced to be confined during Her Majesty's pleasure, and he is placed in a criminal lunatic asylum; but as soon as he is brought to the criminal lunatic asylum the medical men of the lunatic asylum find the man perfectly sane, and not a fit person to be an inmate of a lunatic asylum at all. But it is impossible for the Crown to discharge that man, he having, in the eye of society, committed a crime of that gravity, and the result is that though the man is quite sane he is detained in a lunatic asylum, generally speaking, for the rest of his life.

2981. (*Mr. Waddington.*) He can neither be discharged nor im-

prisoned ?—He is sometimes transferred from that lunatic asylum to an ordinary prison.

2982. Has it been considered that the fact of being confined during Her Majesty's pleasure would justify the Crown in confining a man in a prison ?—Yes.

2983. (*Mr. Justice O'Hagan.*) Do you know of a case in which a man was transferred from a lunatic asylum to an ordinary prison ?—I do not at present remember one, but my impression is that there have been such cases.

2984. (*Mr. Waddington.*) The man has been acquitted of the crime, and therefore it would hardly seem legal to send him to a place of confinement for convicts ?—We have two classes of prisons, convict prisons and others. I think that it is very probable that it would not be right to send him to a convict prison, where he would be subject to convict discipline.

2985. (*Mr. Justice O'Hagan.*) Upon the general question is there anything further which occurs to you ?—My impression is that the fear of such perpetual imprisonment as I have described would be very nearly as deterrent as the fear of death. I admit that when the moment of death approaches, of course a person would very anxiously catch at anything to escape it, but looking at it as a matter in prospect, I think that the prospect of perpetual imprisonment, especially if there was much more certainty in its following upon the crime that there would be of death following upon the crime, would be quite as deterrent as the prospect of Capital Punishment, having regard to the uncertainty which at present exists, and must always exist, of that punishment following upon the crime.

2986. (*Mr. Waddington.*) Has there not been a very great diminution in the number of executions in Ireland of late years ?—Yes.

2987. And also of capital convictions for murder ?—Yes.

2988. Even for murder there has been a very great diminution in the number of capital convictions ?—Yes.

2989. (*Mr. Hardy.*) You do not connect that with the punishment, I suppose, but with the improved state of the country ?—Yes, with the improved state of the country.

2990. (*Mr. Justice O'Hagan.*) Looking at the motives and circumstances which generally lead to agrarian crimes in Ireland, have your observations any particular force or otherwise ?—I think that the punishment of death has not been found to deter men from deliberately committing murders in which they had no interest.

2991. In cases in which they have had an interest, such as some of those which we ourselves have had to deal with in cases of eviction ; what is your opinion ?—I think that in cases of eviction men are carried away by strong passion, by the feeling of wrong, and resentment against those who have been the special instruments of working this wrong to them, and I think that when a man is actuated by those kind of feelings he never pauses to calculate the consequences of the crime which he is about to commit ; he is carried away by that feeling, and I think that the punishment of death under such circumstances does not exercise a deterrent effect upon him.

2992. Is your opinion in any degree founded upon the experience of other countries ? Have you had your attention called to places in which Capital Punishment has been abolished, and to the results of that abolition ?—Not specially, but I have never heard it alleged, nor any figures adduced to prove that in any instance the abolition of Capital Punishment has led to an increase of the crime.

2993. You have said that you think that the case of murder is

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à fortiori on this subject in reference to inferior crimes. Do you not think that the difficulty of obtaining capital conviction from a jury in a case such as a case of theft or forgery would be much greater than in a case of murder, and therefore would not the certainty of punishment increase in proportion to the smallness of the offence to which the punishment was applied?—There is no doubt that that is quite true, but there must always be a great uncertainty in the application of Capital Punishment, whatever the crime is.

2994. (*Mr. Ewart.*) Do you think that the objection of juries and the other impediments to Capital Punishment go on increasing, do you think that there is an increasing feeling adverse to Capital Punishment?—Yes; I think that it is an increasing feeling every year. I think that there is a stronger feeling that it is not necessary to maintain Capital Punishment, and that there is very great danger in coming to a conclusion, especially upon circumstantial evidence. I think that that feeling is increasing.

2995. (*Mr. Justice O'Hagan.*) Have you yourself known any cases in which, with reference to results, Capital Punishment has been wrongfully inflicted?—No, I never have.

2996. Have you considered whether it would be desirable, supposing that Capital Punishment were at all retained, to classify offences of a capital kind, to classify murders?—I have considered that question, but I do not think it possible to do so. I think that there is no medium between preserving it as it is at present and abolishing it *in toto*.

2997. Supposing that Capital Punishment were abolished, do you not think that there should be degrees recognized by the law in that which is now generally called murder, so that a distinction should be made between deliberate and intentional murder, and murders occurring in the course of the execution of an illegal purpose?—Yes, I think that there should.

2998. But you think that Capital Punishment remaining, such a classification should not be effected?—I think that it would be very dangerous to attempt a classification if Capital Punishment were retained.

2999. On what ground do you think that it would be dangerous to attempt it?—I think that it would be impossible to lay down beforehand the class of cases in which Capital Punishment ought to follow. I do not think that you could draw a line between the different classes of cases.

3000. Do you think that it would increase the uncertainty?—I do.

3001. Have you ever considered whether the introduction of such a system as exists in France, namely, of extenuating circumstances, would be desirable or otherwise, if Capital Punishment were continued?—I think that it would not be possible, and that it has not worked well in France. Leaving it to the jury to find extenuating circumstances, I think, would be very dangerous.

3002. (*Lord Stanley.*) Would not it practically be calling upon the jury to pronounce the sentence, and therefore to assume the office of the Judge?—I think so.

3003. (*Mr. Justice O'Hagan.*) Supposing Capital Punishment to be continued, have you also turned your attention to the question whether public or private executions should be preferred?—Yes; I think that private executions ought to be substituted for public ones, if Capital Punishment is continued.

3004. On what ground?—I think that public executions are very demoralizing in their effect, and not at all deterrent, and to private executions I can see no objection if it be provided that they take place

in the presence of the proper officials who are charged with the duty of carrying out the sentence.

3005. Do you think that it would be better for the morals of the people, and for the prevention of crime, that the executions should be private ?—I think so.

3006. (*Dr. Lushington.*) Do you think that they would have the same deterrent effect ?—I think quite so. I think that there is no deterring effect at all belonging to the publicity of the execution.

3007. (*Mr. Hardy.*) You think that a private execution would be more solemn for the criminal himself, than for him to be brought out before a great crowd ?—I do.

3008. (*Mr. Hunt.*) Would you approve of having a coroner's jury summoned to certify that the execution had been carried into effect ?—I do not think that that would be necessary. I think that it should necessarily be carried into effect in the presence of certain officials, and that it would be quite sufficient to have their certificate that the duty had been discharged.

3009. (*Dr. Lushington.*) What precautions would you require ?—I would have the sheriff, and the gaoler, and the chaplain, and persons connected with the gaol present.

3010. Would you compel the high sheriff and the chaplain to be present at the execution ?—The chaplain now always is present as a part of his duty.

3011. In Ireland ?—Yes. I think that the high sheriff should be present at the execution.

3012. (*Lord Stanley.*) The high sheriff or the under sheriff ?—I think that either one or the other should be present.

3013. (*Mr. Justice O'Hagan.*) The under sheriff is now present as a matter of course ?—Yes ; the high sheriff must execute the capital sentence if the under sheriff declines to do so.

3014. (*Mr. Waddington.*) It has been suggested that in Ireland, if the executions were private, the people generally would not believe that the execution had been carried out. What is your opinion upon that point ?—I do not believe that they would suppose that the execution had not been carried into effect.

3015. (*Mr. Hardy.*) In fact the friends of the man might be admitted to see the body ?—Yes.

3016. (*Mr. Hunt.*) Do you think that in Ireland the juries have a strong feeling against Capital Punishment ?—I think that they have.

3017. Do you think that the feeling against taking away human life in the way of murder is as strong in Ireland as in England ?—I think so.

3018. You think that the feeling of the community is as much outraged there in the case of murder as it is here ?—I think so, and I think that juries in Ireland have a very strong feeling against being called upon to act in cases of circumstantial evidence.

3019. Are not murders very often screened by the people of the country ?—Yes ; there is great reluctance undoubtedly to give information in cases of murder.

3020. Do you think that that is a feeling against the law, or a feeling against having a man executed for murder ?—I think that it is a feeling against the law.

3021. I do not mean against the law of Capital Punishment ; but I mean against the law generally ?—Quite so. I think that if the offence be one of an agrarian character there is considerable sympathy with the man who commits it, and a disinclination to give any information.

3022. Putting aside agrarian murders, in the case of other murders

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do you think that there is any feeling on the part of the lower classes against aiding the law to apprehend the criminal ?—I do not think that there is.

3023. (*Mr. Waddington.*) If a man murdered his wife, for instance, would there be any sympathy with the alleged murderer among the population ?—No; there would not.

3024. (*Mr. Hunt.*) Do you think that in the case of robbery there is any sympathy with the criminal on the part of the lower class in any portion of Ireland ?—No, I think not.

3025. You think that it is only in the case of agrarian offences that such a sympathy exists ?—I think so.

3026. (*Mr. Waddington.*) The agrarian murders, I think, are generally deliberate assassinations ?—They are.

3027. Therefore they would be murders of the very worst description? —Yes.

3028. (*Mr. Hunt.*) We have a return of convictions for murder in Ireland, from 1859 to 1863 inclusive; should you be able to tell us which of those were agrarian murders ?—No; I should not be able to answer that question, it would require an investigation of each case in order to be able to answer it.

3029. Are you able to say, from your official knowledge, whether the majority of murders committed in Ireland, in the last few years, have been agrarian murders ?—They have.

3030. Other murders have been very rare ?—Very rare.

3031. Therefore your experience of the reluctance of juries to convict arises principally, from your experience, in the case of agrarian murders ?—Yes; but I have seen the same reluctance to convict in cases of murder not agrarian, where the evidence was only circumstantial.

3032. Can you mention any cases in which you think that the jury ought to have convicted of murder where they have not done so ?—I do not like mentioning any cases by name, because those with which I am acquainted are all comparatively recent ones. I have had experience of several cases in which there were wrong acquittals and the parties are at large.

3033. Those are cases in which you think that there was no reason for the acquittal ?—I think that there was no reason for it.

3034. In those cases were there any palliating circumstances, so as to induce the jury to acquit, because they did not wish the man to be hanged ?—No; I think that they were cases resting upon circumstantial evidence, and the jury were pressed as they always are with the argument, "If you convict in this case you may make a mistake "and do an irremediable injustice." That is an argument which always weighs with them.

3035. (*Mr. Ewart.*) Is there not a general tendency, not only injurious, but on the part of the public and on the part of the judges themselves, to escape bringing Capital Punishment into action if they can ? I think that there is.

3036. And you think that that feeling goes on increasing in society ? I think that it does.

3037. Therefore the uncertainty of the infliction of the punishment of death must go on increasing ?—I think so. I have observed Judges who are perfectly firm in every other case, lose their firmness and vigour in trying capital cases.

3038. If a man is punishable with imprisonment for life, if that punishment was deferred for a year, you could still carry it into execution at the end of the year, but supposing the case of a man punishable with death, could you defer that punishment for a year and execute him

at the end of the year, would not public feeling be against it?—I think that public feeling would be entirely against it.

3039. What is the origin of that difference in the public feeling in the case of the one punishment and of the other?—I think that the feeling is, that if a man is to be punished the punishment ought to follow promptly upon the crime.

3040. You cannot defer it in the one case so easily as in the other?—I do not think that you should defer it in the other case either; whatever the sentence is whether imprisonment or not, I think that it must come into operation soon after it is passed.

3041. Do not you think that the feeling of a great part of society would be against deferring Capital Punishment for a certain time?—Certainly.

3042. Does not that proceed from a certain sense of the vindictiveness of the character of the punishment?—I think that it rather proceeds from the idea that it would be a very cruel proceeding to keep a man with the sentence of death hanging over him for an indefinite period.

3043. (*Mr. Hunt.*) The crime of infanticide is not very frequent in Ireland, is it?—It is not at all frequent.

3044. To what do you attribute that? Can you give any reason for its being less frequent in Ireland than in this country?—I rather think that the number of illegitimate births, in proportion to the population, is greater in England than in Ireland.

3045. You think that the women are chaster in Ireland than in England?—Yes.

3046. Do the women there lose caste if they have illegitimate children?—Yes.

3047. Amongst the lower class of the peasantry?—They do.

3048. The feeling of shame would be very great there at an unmarried woman having a child?—Yes.

3049. (*Mr. Hardy.*) You said, I think, that you would object to giving the juries the power of finding extenuating circumstances. Would you like to return to the old system where the Judge had the power of recording the sentence of death as a means of enabling a sentence to be passed in accordance with what would really be carried out. In a case where the sentence of death was passed it would probably be usually carried out; but where it was merely recorded, it would be changed to a sentence of penal servitude?—I see no advantage in recording the sentence of death. I think that no sentence ought to be recorded unless it is intended to be carried out.

3050. You know that it was formerly the practice to record the sentence of death?—I do.

3051. (*Mr. Justice O'Hagan.*) Suppose a case of legal murder in which the Judge sees clearly that he will be restrained by his feelings, and resolves to recommend that the man should not be hanged, would you not say that there should be some means of avoiding the passing of the sentence of death?—I think that that power should continue vested in the Executive Government as it is now.

3052. But you would have the sentence pronounced?—Yes; in the case of murder.

3053. It has been suggested here that, whether you did it in the way that Mr. Hardy speaks of, or whether you gave the Judge a discretion to pronounce the sentence even in the case of murder, which ultimately he knew would be carried out according to his advice to the Executive, you should not have the Judge go through the strange form of pronouncing a false sentence?—I think that if a person is found guilty of

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murder he should be sentenced to death, and that it is for the Executive afterwards to decide upon the representation of the Judge whether they will carry out the sentence or not.

3054. (*Mr. Waddington.*) You would not give the Judge so wide a discretion?—No; I think that he should be liable to be controlled by the Executive, or circumstances might transpire between the trial and the execution, which might go still further to show that the sentence ought to be carried out.

3055. (*Mr. Ewart.*) Besides the reluctance of juries to convict, and the general disinclination of society to Capital Punishment, are great efforts made with the Lord Lieutenant to get a sentence commuted from Capital Punishment to a lesser punishment?—Yes, there is almost always very great exertion made, and a memorial signed by every one of influence in the place, asking that the sentence may be commuted; then the course takes place of referring the matter to the Judge, and taking his opinion, and then the Executive have the very difficult duty of deciding what is to be done under the circumstances of the case; but in Ireland a memorial, very numerously and respectably signed, is almost always presented, praying that the sentence may not be carried out.

3056. (*Chairman.*) Supposing that the punishment of death was abolished, and that the criminal was taken, as you suggest, straight from the dock to the prison, where he was to undergo perpetual imprisonment, would not the same application to discharge him probably be made?—Certainly, if the Executive found that the conviction was an improper one.

3057. Would not the relatives of the party convicted memorialize the Lord Lieutenant just in the same manner?—Yes, but I am not speaking of the relatives; I am speaking of persons of influence and consideration, not connected with the party at all, who sign a memorial not because they think that the sentence was not a right one, but because they have a great reluctance to see the sentence of death carried out.

3058. (*Mr. Ewart.*) Do you think that in Ireland people go equally from curiosity to see an execution, as they do in England?—No, not at all to the same extent.

3059. Have they greater horror of an execution?—They have.

3060. (*Mr. Justice O'Hagan.*) Did you ever know a case of capital conviction in Ireland without such a memorial as you speak of being presented?—I think that I have known of one case in which there was no memorial, but only one.

3061. (*Mr. Waddington.*) Have you observed the same disinclination to convict in very atrocious cases of murder, as in those cases which may be called the lighter and milder cases, I am not speaking now of agrarian cases?—I think that there is a reluctance to convict in all cases of murder where the evidence is circumstantial.

3062. Is there not sometimes as great a difficulty in cases where the evidence is direct, if there is any imputation upon the character of the witnesses?—No doubt.

3063. Have you not known cases in which upon direct evidence the verdict was generally considered to be wrong, though founded upon the most positive evidence?—In cases of mistaken identity I have, but not otherwise.

3064. You have never known a case of perjury?—No.

3065. (*Mr. Ewart.*) Persons who are hostile to the punishment of death might feel that the facts of the case are strongly against them

and that probably is the reason why they do not memorialize the Lord Lieutenant ?—Yes.

3066. But nevertheless within their own breasts there might exist an equally strong objection against the infliction of the punishment of death ?—Certainly.

3067. It would be no proof that there was not that feeling because they did not memorialize ?—No.

3068. (*Mr. Hardy.*) It appears by the return, to which allusion has been made, that in each of the years 1859 and 1860 there was a case of conviction for infanticide. Previously to that have you heard that the juries convicted of infanticide as murder when it was brought before them ?—They are very reluctant to convict of infanticide ; they generally, where they can, convict of the mere offence of concealing the birth.

3069. I see that one of those cases must have been a case with very strong palliating circumstances, for the sentence was commuted to 18 months' imprisonment ?—Yes.

3070. (*Mr. Ewart.*) Supposing that you could not accomplish your wish to abolish Capital Punishment entirely, would you recommend its abolition in cases of infanticide ; would you draw a distinction between the murder of an infant and the murder of an adult ?—No, I do not think that you could draw a distinction. Generally speaking infanticide is committed under circumstances of excitement and illness, and so forth, but of course it may be committed under circumstances of as great deliberation as any other crime of murder, and therefore I think that you cannot draw a line of that kind.

3071. If, therefore, witnesses before this Commission have attempted to draw a distinction between cases of infanticide and cases of the murder of adult persons, you would not coincide with their opinion ?—I would not.

3072. (*Mr. Hardy.*) Do you think it an unfortunate circumstance that there should be the difficulty which exists respecting infanticide, as to whether the child was still connected with the mother or not, at the time when it was killed ?—Yes ; as to whether the child was born alive or not. There is always that difficulty of determining whether the child lived or not.

3073. Do you not think that it would be a good thing to have a separate offence, making it an offence to destroy a child whether it was attached to the mother or not ?—I think that the offence of concealing the birth almost always includes that.

3074. I think you will find that there are a good many cases where there has been no concealment ?—There are such cases, certainly.

3075. And in which violence has been used to the child, and an acquittal takes place on the ground that it is not certain that the child was separated ?—Yes.

3076. Do not you think that that is an unfortunate circumstance for the ends of justice ?—I think that it is.

3077. (*Mr. Justice O'Hagan.*) Do you not think that it is possible to create a crime ?—I think that it is possible to create another crime. It is now necessary, in order to obtain a verdict of concealment of birth, that the body should have been secretly disposed of. I think that another offence might be created where, though the woman did not actually conceal the birth in that way, yet she gave birth to a child and was guilty of any violence towards it.

3078. (*Mr. Waddington.*) You would make it a felonious assault ?—Yes.

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3079. And that the party should not be acquitted if it turned out to be either manslaughter or murder ?—Yes.

3080. Do you not think that if the punishment of penal servitude was rigidly carried out, it would be a very tremendous punishment ?—I think that it is a very tremendous punishment.

3081. Do you not think it possible that a sympathy of the same nature would spring up in the case of persons sentenced to that punishment as now exists in the case of the capital sentence, and that a jury would have the same reluctance to convict ?—I think not. I think that the jury would not at all have that reluctance. I think that what operates upon the jury is taking away human life, and doing an act which, if it is wrong, will be doing an irreparable injury. I think that that is what always operates upon the jury.

3082. It is not only taking away life, but that they may take it away by mistake ?—Yes.

3083. Which mistake cannot be rectified ?—Just so.

3084. That could not exist in the case of any other punishment, or at least it would be much less probable ?—Yes.

3085. There are, I believe, some persons under sentence of transportation for life in Ireland, who have not been transported, and consequently have been kept at Spike island for a great number of years ?—There are.

3086. Do you happen to know how they have borne their confinement, whether it has produced any effect upon their intellect, or anything approaching to insanity or desperation ?—No ; I never heard that it did.

3087. (*Mr. Justice O'Hagan.*) They work in association in Spike island ?—I visited Spike island and have seen the convicts there ; they are engaged in extensive gangs.

3088. They have nothing like solitary confinement ?—No, excepting when they commit an offence.

3089. (*Mr. Ewart.*) But if it appeared that solitary confinement was affecting the mind of a prisoner, would it not be possible for the medical officer to interpose, and would he not do so ?—Yes.

3090. It would not be a necessity but a choice ?—Yes.

3091. (*Mr. Justice O'Hagan.*) I understand you that, in suggesting a secondary punishment in lieu of the capital one, you would not consider the punishment which is inflicted at Spike island the right punishment ?—No, I think that murderers should be placed in a separate prison, and not classed with other prisoners.

3092. (*Mr. Ewart.*) You would probably exclude them from the sight of their relatives ?—Yes.

3093. You would make them civilly dead ?—Yes, and I would preserve a certain air of mystery as to their treatment in such a prison.

3094. (*Lord Stanley.*) Take the case of a man in that position ; if it was evident that his mind and body were breaking down under confinement without his being positively insane, what would you do ?—I would not discharge him.

3095. You would keep him still ?—Yes.

3096. (*Mr. Ewart.*) You would modify his treatment ?—I would modify the treatment of the prisoner so far as I could, in order to prevent his falling into that state, but I would not on any account discharge him.

3097. (*Chairman.*) Would you rather let him die in prison than discharge him ?—Certainly.

3098. (*Mr. Justice O'Hagan.*) The following case has been put here,

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against your view. Supposing that a man sentenced to penal servitude for life in such a prison as you describe murders a warder, what would you do then ?—That is an extreme case. All I can say is, that I could not do anything, but would only take precautions that he should not commit such an offence.

3099. (*Mr. Waddington.*) It would not do, would it, to reserve the punishment of death for cases of that kind alone ?—Certainly not ; I never should legislate for such a case as that ?—You would not make a law that if a man had been convicted of murder, and put under sentence of imprisonment for life, and if he committed another murder he should be capitally punished ?—I should not do that.

3100. (*Mr. Justice O'Hagan.*) You think that it would rather impeach the system of police ?—I do.

3101. (*Mr. Ewart.*) Ought they not to take certain precautions in the prison against such an offence ?—Certainly ; such a thing could not occur in a prison which was set apart for murderers, and none other, as I say it ought to be.

3102. (*Mr. Waddington.*) Might not a prisoner escape. It is hardly possible to have a prison so constructed as that a very ingenious person cannot contrive to make his escape ?—He might, but then the only punishment would be to apprehend him and remit him to prison,

3103. You would not, if he committed another murder, subject him to the punishment of death ?—No. I think that you should abolish the punishment of death *in toto.*

3104. Do you think that it would be possible to abolish it in cases of high treason, for the murder of the sovereign for instance ?—I certainly would abolish it in cases of treason also.

3105. Do you think that there is the least chance of the legislature doing it ; I am speaking of that particular form of treason, the murder of the sovereign ?—You might except that if you thought proper.

3106. You would not perhaps object to excepting that ?—I should not object to excepting it, but it would rarely if ever occur.

The witness withdrew.

Mr. William Morrish examined.

Mr. W. Morrish.

3107. (*Mr. Waddington.*) You are now Governor of Portland Prison ?—Yes, and have been for the last four months.

3108. Were you formerly Governor of Dartmoor ?—Yes, and Deputy Governor.

3109. How long were you at Dartmoor ?—I have been upwards of 15 years acquainted with the convict service.

3110. Did you commence at Dartmoor ?—I was a short time in Millbank—ten months.

3111. How long were you at Dartmoor ?—Rather over 14 years as Governor and Deputy Governor.

3112. You had, I believe, many prisoners at Dartmoor who were under very long terms of penal servitude ?—There were a good many long-sentence men, a large number of life men, and also men with other heavy sentences.

3113. What has been the effect, as far as you have observed, which has been produced upon the prisoners by a very long term of imprisonment, as respects their health and their mind ?—Generally speaking, it has a very depressing effect. With regard to life prisoners I had occasion to bring the subject under the notice of Sir Joshua Jebb, with reference to a change of their diet, I believe that it originated with me. It was necessary to change the diet of the life men, and he resolved, I

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think, after consideration, to change the diet when they had finished eight years. That was when transportation partly ceased, and there was a difficulty in sending many of the long-sentence men abroad.

3114. When transportation was in full vigour they were never kept in one prison for any length of time ?—Only a very short time ; longer, perhaps, in Dartmoor, because it was an invalid establishment, very frequently three or four years, and therefore they remained longer with me perhaps than in any other prison in consequence of their being unfit, in a medical point of view, for being sent abroad.

3115. Even those men who were under sentence of transportation or penal servitude for life, were not without a hope of a mitigation of their sentence ?—They were not without hope. At first their period was ten years, then it was extended to 12 ; but there was always a very strong desire on the part of those men to go abroad, because they would have had a conditional pardon in the colony at the end of eight years, and therefore they frequently expressed themselves dissatisfied, because they could not have the same privileges as the other men.

3116. But the cases of those men who were kept in England were taken into consideration at first after ten years ?—Yes.

3117. And afterwards after 12 years ?—Yes.

3118. The present rule is that there is no particular time for taking them into consideration, but that they are left entirely to the mercy of the Crown ?—Yes, their names are submitted under certain restrictions at a certain period, but with no promise whatever held out to them that they are to expect a licence.

3119. (*Mr. Hunt.*) Do the life men work with the other men ?—Yes, they all work together.

3120. Do you give them a higher diet ?—No ; under the reduced diet there is no such provision as formerly existed, the diet was formerly improved after eight years ; it is not sanctioned at present, we do not know whether it will be necessary to make any recommendation upon that point. The diet lately has been very much reduced. The diet only came into force at Portland a few months back and therefore no case has yet been brought under consideration.

3121. (*Mr. Justice O'Hagan.*) Is it the opinion of the Directors of Convict Prisons generally that a higher class of diet is necessary for persons under long sentences ?—It was recommended in this case with reference to life men, but I think only with reference to life men.

3122. (*Mr. Hunt.*) Is that on account of the effect on their spirits ? —I think it very likely ; their spirits generally become more depressed, because generally they are not so criminal as the majority of prisoners.

3123. (*Mr. Waddington.*) That is those under life sentences ?—Yes.

3124. You mean that they are not so habitually criminal ?—Yes ; they have fewer previous convictions against them than any other class of prisoners.

3125. They have committed crimes of great enormity ?—Yes.

3126. But they are not a part of the professional class of criminals ? —Certainly not.

3127. (*Mr. Hunt.*) Is there more tendency to commit suicide among the life men than among others ?—I do not think that I have had any case of suicide amongst the life men.

3128. (*Mr. Waddington.*) But all these men are not without hope ? —Just so.

3129. They all retain hope ?—Yes.

3130. And with good reason ?—Yes. As a class, the life men generally admit that they are suffering justly. They have committed a

very great crime, and they look upon it as perhaps a merciful consideration that their lives in many cases have been spared, and that they are allowed at a comparatively early period to look forward to their liberty, provided they earn it by industry and good conduct.

3131. Some of these life men have been sentenced for life, and others have had their sentences commuted ?—Yes.

3132. And you find those men generally grateful ?—Yes. The life men generally have that feeling when their sentence has been commuted.

3133. Can you form any opinions as to what would be the effect of a long imprisonment upon these men if it were clearly understood that they were to be confined for the remainder of their life ?—Judging by the effect produced upon short-sentence prisoners during the years 1853 and 1857, when the licences were withheld, there can be, I think, but one opinion—that if you deprived these men of all hope they would become very difficult to manage, and the question, I think, is how far their minds will become affected, and in my opinion they would become a very dangerous class of prisoners to deal with.

3134. Would there be any difficulty in placing prisoners of that description, namely, murderers who were put under an irrevocable sentence for life, in a separate prison or a separate department of a prison, under peculiar treatment ?—If it were desirable to do so, I think that they should always be kept in restraint of some kind, and never allowed to associate with others. You could not put a body of life men in prison and allow them to work as short-sentence prisoners do. I think that they would become very dangerous. In working the prisoners in parties it is never safe to put all men with a heavy sentence in one party. They are distributed as much as possible ; that is the rule at present. The long-sentence men are generally regarded by prison officers as a dangerous class.

3135. Have there been many assaults and outrages upon warders at Dartmoor ?—A great many.

3136. By what class of prisoners are those attacks generally committed, I refer to the length of the sentence ?—The assaults have not been particularly more numerous by heavy-sentence men than by short-sentence men. Perhaps Dartmoor ought not to be taken as a guide of the number of offences, because it is entirely an invalid establishment, and it is very difficult to carry out any kind of fixed discipline. The prisoners all know that perfectly well, and they sometimes escape a severe punishment for a very serious offence in consequence of the medical man saying that they cannot undergo it, and many cases of slight punishments have been remitted on the recommendation of the surgeon.

3137. (*Lord Stanley.*) Why is that peculiar to Dartmoor ?—It is entirely an invalid establishment, and there is another establishment at Woking where there are a still worse class of invalids.

3138. If I recollect rightly a great deal of work has been done round the prison at Dartmoor in the way of recovering very rough and wild land, involving very heavy labour. That has been done by the convicts ?—Yes. But the quantity of work which has been done has been rather limited for the number of men.

3139. (*Dr. Lushington.*) The establishment at Woking is of a different description ?—A worse class of invalids are received at Woking than at Dartmoor. If they recover they are sent to Dartmoor, or they may recover so as to be fit to perform light labour at some of the other public labour prisons.

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3140. (*Mr. Waddington.*) From your intercourse with convicts, or from what you have heard from warders, have you formed any opinion as to their feeling generally upon the subject of the punishment of death?—I have never heard any of the warders express any opinion about it.

3141. Have you conversed with any of the prisoners about it?—No.

3142. (*Mr. Hunt.*) What is your own opinion as to the deterrent effect of the punishment of death over other punishments?—I think that if a person understood that he was not to be hanged for a heinous crime, serious crimes would multiply, and they certainly would multiply in prison.

3143. What makes you think that they would multiply in prison?—Because I think that a prisoner would feel that he had nothing to hope for, and therefore he would become desperate.

3144. (*Mr. Waddington.*) He would have nothing to hope for, and nothing to fear?—Yes.

3145. (*Mr. Ewart.*) Could not you make provision against those dangers by increasing the force of warders?—It is almost impossible I think to provide against all those casualties, as prisoners have such opportunities of committing assaults upon officers. They might be kept in separate confinement, but that I apprehend is quite out of the question. We know perfectly well that the present confinement in Pentonville and Wakefield is quite as long as is consistent with a man's state of mind. We know what the effect of two years separate confinement was at Pentonville when it was first established, and also at Wakefield. As Deputy Governor of Dartmoor, I received a great number of prisoners from Pentonville and Wakefield. I am speaking of the early part of the time when the period was two years; and in some cases at Wakefield it was over two years. I have put the most commonplace questions to the men who used then to come to Dartmoor prison, and have tried them in that way. I have put such questions as it is the duty of the Deputy Governor to put to prisoners, and frequently they could not answer them.

3146. (*Mr. Hunt.*) They were reduced to a state of idiotcy?—Yes.

3147. And you attribute that to the length of their separate confinement?—Yes. That has since been reduced; and there has been since a very manifest change for the better with reference to prisoners coming from those prisons. There is nothing in their appearance or in their answers now which would indicate that their state of mind has been injured.

3148. (*Mr. Ewart.*) Then their former treatment was an error on the part of those who inflicted the punishment by pushing it too far?—It would appear so.

3149. (*Mr. Hunt.*) You use that to show that it would be impossible to keep men except in associated labour?—I think that prisoners for life could not be kept for life unless in separate confinement; and if they were so kept their minds would, I think, suffer.

3150. (*Mr. Hardy.*) Then you think that it would be impossible to conduct a separate prison for murderers where the imprisonment for life had inevitably to be carried out?—I do not say that it is impossible to conduct it, but I think that it would be conducted with great risk; first of all, as regards the safety of the officers' lives; and secondly, as regards the state of mind of the prisoners.

3151. (*Chairman.*) That is to say if you kept them in that state, which you must do, so as to keep them in order?—Yes.

3152. (*Dr. Lushington.*) Provided all hope was extinguished?—Yes.

3153. (*Mr. Ewart.*) But in America and in Switzerland, and in other places where the punishment of death has been abolished, they do contrive to keep them in order?—I believe that when Pentonville was established the system there was something the same as the American system; I have understood that the early treatment in the American system has been very much diminished.

3154. (*Mr. Hunt.*) Have you ever visited prisons in foreign countries?—No, I merely speak from what I have read.

3155. (*Mr. Justice O'Hagan.*) During your experience I suppose that at no time has there really been a life sentence; the prisoners have always had an expectation of getting out at a certain period?—Yes; the longest period that I have known men to be detained has been, I think, 12 or 13 years. I think in a few cases at Dartmoor prisoners remained rather over 13 years.

3156. There was no actual experience of the effect of a life sentence intended to be really carried out?—No; I have had no experience of that, I only draw my conclusions from the effect of short sentences.

3157. (*Mr. Hardy.*) But even as regards long sentences, I understand you that it is very difficult to keep men, with those long sentences, in association?—Taking the minimum period as 12 years I think that it is not, and that those men are, generally speaking, well behaved, and I attribute their good behaviour, and their industry to the circumstance that they know perfectly well, that by good conduct and industry their cases will be taken into consideration at a given period.

3158. I understand you to say that you do not associate them together but mix them up with the short-sentence men?—Yes.

3159. And that there would be a difficulty in putting men with long sentences all together?—Yes.

3160. (*Dr. Lushington.*) There would be an apprehension of danger?—Yes; I think that there would be a greater probability of their combining together, and therefore much greater danger in putting a large body of those men together.

3161. (*Mr. Justice O'Hagan.*) Do you think that there would be no chance of their reconciling themselves to their condition if they were perfectly certain of being there all their lives?—Some minds perhaps would become quite indifferent, but I think that those are a class of men whose state of mind is very questionable; I have had some men at Dartmoor in that state of mind, but they were men of feeble intellect, who were in for some very serious offence, an unnatural offence, or something of that sort, but they appeared to care nothing about it. Generally speaking those men are at times very violent and very dangerous characters.

3162. (*Dr. Lushington.*) Have you had under your care any man with respect to whom you believe that all hope has been extinguished? No.

3163. (*Mr. Waddington.*) That in a measure depends on his conduct?—Yes.

3164. And therefore a man under a sentence of penal servitude for life has no greater hope than a man with a short sentence?—No; men frequently misconduct themselves when they first come into prison, but when he finds that his sentence comes nearly to the time when he might have got away, he begins to feel his punishment very seriously. There is no doubt that men, under sentence for life, feel the end of their punishment much more acutely than any other class of men; they get unsettled and very anxious, and they would, if they dared, misconduct themselves.

3165. (*Mr. Hunt.*) Do you receive men shortly after their commuta-

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tion of sentence in the case of prisoners who have been convicted of capital offences, and whose sentences have been commuted?—We have received them, on an average, about nine months after they have been under separate confinement, but not before.

3166. (*Chairman.*) They would go to Pentonville or Millbank first?—Yes; or Wakefield, or Leicester.

3167. (*Mr. Hunt.*) Have you any opportunity of eliciting from them anything as regards their feelings?—Only occasionally, as they may require to ask how they stand with reference to their liberty, or any question regarding themselves; but, as a rule, I do not seek them out, I think that it is detrimental to discipline; I think that is far better that a prisoner should only see the Governor if he really has anything to tell him. But as a general rule the life men do not trouble you so much as the habitual criminals.

3168. (*Mr. Waddington.*) Since you have been transferred to Portland have you observed anything which has induced you to change or modify any of the opinions which you have stated?—No, I think not.

3169. Are there any long-sentence men at Portland?—There have been 75 in the prison in the last five years. They have remained a shorter time at Portland than they would at Dartmoor, simply from being eligible for transportation to a colony, and the long-sentence men, provided their conduct is satisfactory, are generally selected.

3170. Therefore they would not be kept there any great time?—Only about 10 months on the average of the last five years.

3171. (*Dr. Lushington.*) They are at Dartmoor for a much longer time?—Yes, in consequence of their not being fit to be sent anywhere else. On the average they are there about 11 years; that is taking the last 14 or 15 years.

3172. (*Mr. Ewart.*) Can you give us any idea of the number of persons who would be subject to life imprisonment in case of the abolition of Capital Punishment?—I have a return with me with reference to Dartmoor prison. I do not know whether the Commissioners would require to see it; it is merely a return of the number of prisoners in Dartmoor prison while I was governor. I have it likewise for five years at Portland prison.

3173. You have no general return?—No.

3174. (*Mr. Hunt.*) Have many prisoners under your charge been removed to Broadmoor?—Not since I have been there, but I think that some few cases have been removed; some have been removed to do ordinary work, but they have been ordinary prisoners. Your question relates, I presume, to their state of mind?

3175. Yes?—Not any.

3176. (*Lord Stanley.*) I take it to be the purport of the evidence which you have given, that in your opinion hope is an essential element of penal discipline?—I think so under any circumstances, whatever the sentence may be.

3177. You think that to manage men who are sentenced without hope of remission would be a work of extreme difficulty?—I think so.

3178. (*Dr. Lushington.*) If they believed that it would be carried out?—Yes.

3179. (*Mr. Hunt.*) If they were associated you think that they would be very dangerous to their warders?—Yes.

3180. And that if they were in separate confinement the effect on their minds would be such that they would not remain sane?—Yes.

3181. (*Mr. Ewart.*) Might you not prevent danger to their warders by increased vigilance, and might you not diminish the effect upon their minds by medical treatment, and seeing what state they were in, so as

to modify the treatment of the prison if possible?—I believe that it would be almost impossible to do so. *Mr. W. Morrish.*

3182. Has it not been done in several countries? Has it not been done in one case in America for 18 or 20 years?—As far as regards life cases I cannot say. 11 Mar. 1865.

The witness withdrew.

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3183. (*Mr. Ewart.*) What is your position?—I am a Barrister in France. I have attended the bar from 1834; in the town of Douai, Department of the North, for 12 years, and afterwards in Paris. I have attended many cases of men tried for capital offences, especially in Douai. I have studied our criminal laws and the different theories respecting the penal cases. My opinion as to the punishment of death is that, in the state of our morals in France, it might be abolished without any danger to the public security. And my reasons for thinking so are, first, that the punishment of death has decreased gradually from the beginning of the century, and the capital crimes, notwithstanding, have diminished in the same proportion, while it would have been the reverse if the deterrent effect of Capital Punishment were such as it is sometimes supposed to be. I have seen in very frequent interviews with criminals as a counsel, men who were tried for abominable cases, and I have remarked principally that those persons were to the utmost degree improvident, and certainly to me the motives which had driven them to the greatest crimes did not leave them the liberty of mind necessary to consider, at the moment of the action or before it, the penalty which they incurred. Therefore, if instead of the punishment of death, there had been only for them hard labour for life, I think that it would have been exactly the same. They had only in view to commit a murder either for a reason of cupidity, or revenge, or love, or some of those great human passions. But I think that if perchance they had a sight of the penalty which they were to incur, they would only say "I am resolved " to risk my life, it is well if I succeed; if I do not, I do not care " about it; it is nothing to me;" but it was a prospect very far from them, and they acted without being provident, and with no consideration whatever of their fate after their condemnation. In other terms, there is a very great difference, in my mind, in a man before condemnation and after condemnation. I have seen in many cases men condemned, not to death, but to hard labour for life, or for a time, from 5 to 20 years, crushed with the utmost despair. I saw it stated somewhere, in some English reports, that criminals think that it is nothing to be deprived of liberty for life; it is not so in France. In general our penalties act most severely upon the public mind. In my opinion those are the general motives for the abolition of the pain of death.

Now what is in France the state of public opinion respecting Capital Punishment? Naturally the opinions are much divided in France as in England, but yet I must say that there is not much excitement in the public now about Capital Punishment. The reason is this,—there are great restrictions in the application of that pain, of which I will speak to you in a moment. The power of pronouncing it is in the hands of the jury, that is to say of the country itself, and therefore we cannot blame the law, since we are ourselves at liberty to sentence men to death, or only to hard labour. I think that the opinion in France by degrees accepts more and more the remission of Capital Punishment, and the mercy which is given by the sovereign to men sentenced to death. Our law of Capital Punishment is applied only in some

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extreme cases; and as I will say in a moment, after a jury has found a man guilty of a capital crime, without extenuating circumstances, the sovereign very often commutes the penalty for a secondary penalty.

Our law, as I have said, admits now of Capital Punishment, but yet there was a great reform in 1832 which completely modified the system of our penal laws. I will speak of it to the Commission in a moment. But I think it necessary to state first what are the crimes which are now punished according to our law by the pain of death. They are practically only qualified murders, that is to say, qualified by circumstances, such as assassination; poisoning, infanticide, murder not qualified in some cases only, arson, and recidive in a case where a man has been sentenced to hard labour for life and commits a second crime liable to the same punishment, but generally in that case the penalty of death is not applied to him. Before our penal code of 1832 a greater number of cases were punished by death, and our code of 1810 numbered nine cases more in which that penalty was applied. It was at first for political crimes, forgeries, and false coins, or false bank notes, and such crimes. Some cases of arson were abolished in the new penal code. In cases more numerous than now, simple murder and robbery with aggravating circumstances were punished by death. As you see, that code was much more severe than it is now; we enjoy I think very liberal and humane penal laws now, but yet the code of 1810 was not, as I have heard it called in England, a "bloody code;" it was, I think, moderate for the times, and in England, at the same time, there were many cases punished by death which were not so punished in France; you had a great number of robberies punished by death which were not so in our country even with that code of 1810; but yet I must acknowledge that it was a very severe code; I might give the reasons for it to you, but perhaps it is useless. Still this code had a great inconvenience; it was as I have said too severe, and when the jury were asked to give an answer upon a trial, in many cases, as they could not mitigate the penalty, they answered "No," while the facts were very well proved, or they laid aside aggravating circumstances which were equally well proved. It was what we called in France the omnipotence of the jury, and indeed it was, I think, for counsels, the best time, because if a prisoner was in such circumstances as to excite pity, instead of leaving him to be sentenced to death, it was easy enough to persuade the jury that they might give him mercy and place him at liberty; but there was evidently a great peril for society in that proceeding, and a failure of justice. In some cases a man was set at liberty when evidently the jury would have sentenced him to a secondary punishment with no difficulty, and they would have done a much better work, according to justice; but so it was. When our law was reformed in 1832, the great modification resulted from two different points. First, as I have said, there were nine cases of Capital Punishment taken away from our law; but moreover, for the remaining capital cases, the law introduced a new system; that system consisted in this, that the jury were allowed to cause the penalty to be reduced by two degrees; therefore, if a man had incurred the penalty of death, by admitting extenuating circumstances, the penalty could be hard labour for life, or even hard labour for a time, that is to say, from five years to twenty years; the Commissioners see on what a large scale the jury may influence the application of the penalty, from the penalty of death to hard labour for five years. The extenuating circumstances were indeed for the Government a *mezzo-termine* dispensing them to take a decisive step about Capital Punishment in itself. In France, in 1832, it was a great question whether Capital Punishment might or might not be abolished; after the Revolution of 1830, many petitions were sent to the

Government for the abolishment of the penalty of death, but the question was adjourned till the reform of which I am speaking. When that reform was being made the Government would not take on itself the responsibility of abolishing the penalty of death because it was not at all considered as certain that the public security would not be endangered by such a measure, but yet it was impossible to keep together the old system and the new system of extenuating circumstances.

Now what are extenuating circumstances? They must not be confounded with some circumstances like provocation; provocation is a special case, and the jury are interrogated about it when the case seems to admit it. I suppose a murder; but if there has been provocation, the jury having answered in the affirmative about this circumstance, the penalty is no longer the penalty of murder, but a secondary penalty very much mitigated, and yet in that case the jury, answering that there was provocation, may answer at the same time that there are also extenuating circumstances.

3184. There is a distinction between provocation and extenuating circumstances?—Yes.

3185. (*Mr. Waddington.*) Provocation alters the character of the crime?—Provocation completely alters the character of the crime, but extenuating circumstances do not alter it, and perhaps the words themselves, "extenuating circumstances," were a very unhappy term, because the idea which is inferred is not correct. For the greatest crime, such as parricide, it very often happens that the jury find a man guilty, and yet allow extenuating circumstances.

3186. And in poisoning cases also?—Yes. It is not extenuating circumstances for the crime itself, but it is circumstances extenuating for the person. There is, we will say, a young man repenting, and perhaps having been provoked by his father, coming to support his mother, and in a desperate moment, making what you may call a bad blow. It is the greatest of crimes in itself, but when the jury have to pronounce upon it they say, "It is a crime no doubt, which admits of no excuse; "but yet the scaffold is too much for that man; we have mercy upon "him, and we have a right to say that there are extenuating circum- "stances." If it were so understood, I think that it could not be blamed as it is sometimes, because the public opinion says only, "That "man is very guilty, he killed his father, and yet the jury find extenu- "ating circumstances, in what case shall they not find them?" But as I say, the origin of extenuating circumstances must be found elsewhere. I have been asked whether the jury might give an answer with motives for extenuating circumstances; the law has not thought so, and, for my part, I think that it would be impossible. What is the reason why one man deserves pity and another is not deserving of mercy? The crime is the same. If we fall under a text, certainly the penalty must be the same, but yet there is a great difference between two men, the circumstances being legally the same. Now, what motives can you give for that difference? I dare say that generally it is not possible to express it in words; you feel it better than you can express it; and so it has been thought in France, when the law was made in 1832. That is, I think, what I have to say with regard to extenuating circumstances.

3187. I think that the power to find extenuating circumstances is not confined to capital cases, but extends to all criminals?—Yes, it extends to all criminals.

3188. Whether punishable with death or not?—Yes.

3189. It was not solely with a view to mitigate the punishment of death generally that it was introduced into the French law, but to mitigate the punishment for all crimes?—Yes; I must say that we

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formerly had a code which indicated a fixed penalty for every crime. In our ancient laws there were arbitrary penalties at the *arbitrium judicis*. When our Revolution broke out in 1789 the necessity was universally felt to escape that arbitrary power at all price, and they made a code in which there was an invariable taxation with no maximum and minimum for every act; for such an act, the pain of death; for such another act, hard labour for life; for another, hard labour for ten years, and so on; but it was very unjust in many cases, because the morality of one man is not the same as the morality of another, the facts being the same, and therefore there was a necessity for us to come back to penalties arbitrary to a large extent; and such are our present laws, not only for Capital Punishment, but for every criminal act.

3190. Is branding entirely abolished?—It is abolished; it was abolished in 1832. I have said that the law in a sense abdicated its power to give this power to the jury, and the extenuating circumstances are considered in that way by our jurisconsults. There is a quotation which, perhaps, I might read to you in English. "To our "eyes the present law is a matter of transition between two opinions; "it is not the maintaining Capital Punishment—it is not its abolition; "in fact if the penalty of death remains inscribed in the law, though "very happily reserved for a very small number of cases, on the other "side the right attributed to the jury to declare in every case "extenuating circumstances, and the effect of this declaration to "cause to reduce necessarily the penalty one degree, gives in fact to "the jury, and the jury alone, the right of maintaining or abolishing "as they like the capital penalty. So the law abdicates its power; "it pronounces the penalty, and remains inert in the application of it; "it is with the great institution of the jury to say what the penalty "shall be; it is the country itself which is called to deliberate in the "last resort on the maintaining or abolishing of the most terrible of "punishments. So we may affirm to day that the penalty of death is "almost in fact abolished."

3191. (*Mr. Ewart.*) In France?—Yes. This is a quotation from a jurisconsult:—"The pain of death is, in fact, almost abolished. We "enter a sphere of experience; may that experience sanction the "vows of humanity." When the penal code was being made in 1832, the opinion was received of the Garde des Sceaux; the Garde des Sceaux, with regard to the penalty of death, said that the new law was conceived with a thought to complete abolition, but that immediate abolition was not practicable; he said that there were crimes so dangerous that very great difficulties would be raised against the mitigation of the penalty. He says, "It must be maintained for cases "which shall be very rare; it shall be maintained in our laws as a "frightening for crime. The penalty of death may be abolished "further when the suppression will be in harmony with the public "morals. The new law has for its object much more to decrease the "recourse to that last and lamentable resource for society against "crime." M. Dumon, before the Chamber of Deputies in France, expressed exactly the same opinion, and the hope that one day or other the penalty of death might be abolished.

3192. What is the date of that opinion?—November 1831; it was upon the deliberation as to the penal code.

3193. (*Chairman.*) The code of 1832?—Yes. M. Dumon was afterwards a minister in the reign of King Louis-Philippe, from 1843 to 1848, and he had been a barrister. Before the House of Peers the same opinion was entertained, and in terms which permit us to understand that it was considered that Capital Punishment may be and

must be abolished at some time or another, but not directly. Count de Bastard, in his report to the House of Peers, spoke as follows:—"Your Commission is far from pronouncing itself against the future "abolition of Capital Punishment. Your Commissioners join in the "views of those who hope that that penalty may one day be taken "away; but it is only by degrees that it may be erased from our laws. "(8th March 1832)." I must say that if the Penal Code in 1832 abolished the penalty of death in several cases, after that period the same penalty was abolished for all political cases—that was in 1848. After that date there were several penal laws, but Capital Punishment was never re-established for political crimes, and so now there is no penalty of death in any case merely political.

3194. (*Mr. Justice O'Hagan.*) What do you call a political crime exactly in France? Would rising in rebellion against the Government be a political crime?—Yes.

3195. It would require a man to commit a murder in the course of his rebellion to make him punishable with death?—Yes; murder in a rebellion remains an ordinary crime, and so it was judged on several occasions. Such a case was tried in France on a great occasion. There was an attempt to murder the Emperor, and it was certainly a crime moved by political reasons, but yet the crime in itself was an ordinary crime, and the men found guilty of that crime were justly condemned.

3196. (*Chairman.*) And they were executed?—They were.

3197. (*Mr. Justice O'Hagan.*) You allude to Orsini and his associates?—Yes, Orsini and several others. I must add that, from 1830 to 1848, under the reign of King Louis-Philippe, not a single execution took place for political crimes. Now what have been the statistical results of those modifications in our law? I must say that according to the reports in France in 1825, there were 134 condemnations to death in the year, and there were 111 men executed. The number was the same in the following year, in 1826. After that, it decreased gradually till the year 1832, and in 1833 there were only 40 men found guilty and sentenced to death. There were 12 executed that very year, in 1833. From that time down, the number of men executed decreased considerably. Last year, in 1864, there were only nine condemnations, and only five men were executed. In the preceding year there were 20 condemnations and 11 men executed. You therefore see that Capital Punishment is far from being resorted to so often as it was under the preceding code.

Now it will be interesting to state what are the principal capital crimes. There is a distinction made in our law between the different degrees of murder. It is very easy to understand it and to explain it. There is, first, homicide, that is the fact of killing a man in whatever circumstances, but the circumstances may be greatly different. If you kill a man willingly, and only willingly, with a will conceived in the very moment of action, it is a murder. If the murder was preceded by other circumstances, such as premeditation and the preparation of means, it is assassination. Assassination only is submitted to the penalty of death. Murder generally is not punished by death, except, however, in some cases such as poisoning, because our law thinks that a man who administers poison to another man has necessarily a premeditation of the crime. There is another case in which simple murder is punished like assassination: in the case of parricide, that is to say the greatest crime, the law thought that it must be more severe and assimilate murder in that case to assassination. It is the same with the crime of murder against the sovereign. But generally and practically, assassination which is homicide with premeditation, only is punishable with death. Now

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there is another crime for which the penalty of death is also inscribed in our code; it is infanticide. But yet practically the penalty of death is scarcely ever applied in the case of infanticide. I must say, regarding that, that the French law is much more precise, I think, than the English law. We call infanticide the murder of a new-born child, and by a new-born child we understand only a child who is not yet registered among the citizens. Till that moment the child is not under the protection of the law. Its existence is unknown and it is unprotected, and for that reason the law must protect it. But in the case of a child some days old (and there is a greater reason in the case of a child some months old), it is no longer an infanticide; it is a murder, or an assassination. The child, then, is in the same case as everybody among the citizens in France.

3198. What do you mean by a child being registered among the citizens?—When a child is born, within three days after the birth it must be presented to the mayor and inscribed in the books of *Etat civil*. But perhaps that circumstance may be omitted by the mother. The child may be concealed, and for that reason there is no exact date fixed by our law in which there may be infanticide. We will suppose that a child is concealed and killed only after 10 or 15 days, or perhaps six weeks; it is an infanticide, the child being not registered.

3199. What is the punishment for that?—It is death. But practically the jury scarcely ever authorize death for that case of infanticide.

3200. Until the registration?—Yes; in any case of infanticide. There are several circumstances which may be taken out by the jury. The crime of infanticide is very often changed by the jury to that of the suppression of state; that is to say, that if it is not proved that the prisoner willingly killed the child, he is declared not guilty of that crime, but still may be declared guilty of having suppressed and done away with the child; it is a special guilt for which the penalty of *reclusion* is pronounced from five to ten years. The jury very often find that it is not proved that the woman has killed the child, but yet pronounce her guilty of not having given necessary care at the moment when the child was coming into existence; we call it homicide by imprudence.

After having spoken of the extenuating circumstances, I may speak about the *Droit de grâce* of the sovereign. In a great many cases, Capital Punishment is abolished by the jury themselves, as we said, by admitting extenuating circumstances, that is well; but when a man is sentenced to death, there is still another hope for him, it is that the sovereign, who examines with great care every case in which the penalty of death has been pronounced, may have mercy for the guilty man; and there is I think a difference between the *Droit de grâce* in France and what is done in England. I have seen that in England when a jury has found a person guilty, the Judge of the Assizes may give an opinion for the convicted man, or against him, and generally the Secretary of State is bound more or less to follow the opinion of the Judge. It is not so in France. When the penalty of death has been pronounced, no extenuating circumstances being declared by the jury, the man may apply to the sovereign, and ask for mercy. In cases of death punishment, the Emperor himself examines the papers of the procedure, the evidence of the witnesses, and everything in the proceedings, and even when the President of the Assizes and the Minister of Justice are against a commutation of the penalty, the sovereign may abolish the penalty, or give a commutation of it; and I have had an example of it. A man for whom I acted as counsel was sentenced to death;—after the judgment I saw the Procureur-General, who addressed the jury against the man before the Court of Assizes; I asked

whether his opinion would be favourable to him ; he answered "No ;" and said "I think that the law must be executed." I gave to the Procureur-General several motives which I thought might make him more inclined to be favourable to the prisoner. He gave me answers to every motive, and persisted in his opinion. I saw him three times again, and he sent an opinion against me, but yet I asked to be permitted to give him a note which might be put with the papers of the information, and the procedure was sent to the *Ministre de la Justice.* The Minister was of the same opinion as the Procureur-General, and yet when the Emperor saw the case and read my note, he himself personally accorded a commutation of the penalty, because I had in that case pleaded for two men, the interest of one being not exactly the interest of the other, and I had been restrained in my defence by that consideration that I could not give certain means of defence for one of them without a prejudice to the other. The Emperor said "The life of that man must be spared." It is at my personal knowledge that the *Droit de grâce* was exercised in the same manner by King Louis-Philippe personally, after a most scrupulous examination of the case and trial. Generally the penalty of death is commuted to hard labour for life, but when a man is sent to hard labour for life the penalty may be altered again, and modified.

3201. (*Mr. Ewart.*) Then there is no irremissible punishment?—Every punishment is always remissible. The penalty of hard labour for life is never, in fact, remitted before 20 years; but after 20 years mercy may be given by the sovereign, and the man may be set at liberty. In France, unhappily, there have been of late years some innocent men sentenced to death—some of them were executed and some were not. There is especially the case of a schoolmaster who was tried for assassination, arson, and theft ; several witnesses went before the Court of Assizes, who gave evidence that they knew him very well ; that they saw him on the night on which the crime was committed ; that one of them saw him going, directing his steps towards the spot of the crime. Others had seen him some time after it near to the spot where the crime took place ; some others had seen him putting a match in the roof of the house ; others had seen him coming back from the spot and returning home. Indeed I do not know any case where the evidence was stronger against a man than it was in that case, and yet (I do not know why) the jury found extenuating circumstances. He was sent to hard labour for life. Several years afterwards there was some quarrel between all those witnesses, and some strange words were heard by the police. One of those witnesses was asking money of another, and frightening him to speak ; justice was put on the wake, and the true murderers, the guilty men, those false witnesses, were tried and convicted. In some other cases, unhappily, innocent men have been executed.

In France the execution is made publicly, and it is a question whether it might not be made in private ; for my part I should have a great many objections to executions in private, in France perhaps more than in any other country. We have had several revolutions and a very bloody one ; the penalty of death was strangely applied in very horrible cases. I think that if the executions were made in private there would be no security for human life in time of public troubles. It might be necessary, even for executions in private, to give publicity in the newspapers ; and the peril for society would be the same by that publicity. When a man is executed the newspapers give all the circumstances of the execution. But I must say that there are not in France the same horrible circumstances as I have heard there are

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sometimes in England. In France our executions are not announced beforehand; nobody knows beforehand the day and the time when an execution may take place, and generally the executions take place in the morning at six o'clock on a remote place of the town—but yet a public spot. When the scaffold is being raised, a part of the population, of course, knows it, and there are 2,000, 3,000, or 4,000 persons perhaps looking at it as at an exhibition. I do not know, having never seen it, what is the effect of those public exhibitions, and for my own part I do not think that any great good results from them; but yet all is kept in order, and there is no tumultuous riot as in other countries.

3202. (*Chairman.*) That is to say in England?—Yes. In France the feeling certainly, when the penalty of death is executed on a great criminal, is a feeling of justice. I dare say that now the feeling of personal security is not, in general, looked at by anybody. There were, as I have said, five criminals executed last year, and we do not at all think that our life would be imperilled if those five men had not been executed. But yet generally there is a sentiment of pity and mercy, which was very greatly excited about the recent case of poisoning by a professional man in Paris, who had poisoned a woman, and when the hour of the execution arrived there was certainly pity for him; but however, the feeling which prevailed, I think, was that of justice, and that the penalty of death was rightly applied as being a just retribution. But while I am saying so I must add, as I said before, that I think that in France the public mind is more and more inclined to see the penalty of death less and less resorted to. It is not correct, perhaps, to say that the majority would wish to see it completely abolished; we should like better to see it falling into desuetude, and so abolished gradually. That is, I think, all that I have to say to the Commissioners.

3203. (*Mr. Ewart.*) Notwithstanding what you have just stated, you have previously said that you think that Capital Punishment might safely be abolished in France, seeing that only five persons have been executed in one year?—Yes; but that is only a personal opinion, and I must give it with great reserve. I think that there would be no danger in abolishing it completely and immediately, but at the same time I must state that most probably such would not be the public opinion, and that especially the magistrates in France would not think so; the public at large would better like to see it diminishing gradually, my opinion and the public opinion are two different things.

3204. Do you approve of the jury, when they find a verdict of extenuating circumstances, giving their motive for that finding?—No; I do not think that it would be possible, the jury would certainly be in a great difficulty in stating for what motive a man is worthy of those circumstances or not. Suppose a young man of a good family, repenting, who previously had a good reputation, and who, after a moderate penalty may be restored to liberty with security, the jury are merciful; but if the relations of that man are very bad or he looks a resolute profligate, all is hopeless from him. All such considerations influence the decision of the jury.

3205. It appears that the crime in France has gone on decreasing while Capital Punishment has decreased at the same time?—Yes; I may state that in figures.

3206. There has been a diminution of executions?—Yes. In the report of 1860 you will find it to be so, being exactly stated so by the *Garde-des-Sceaux.*

3207. With regard to confession in France, if a man confesses

promptly has he less punishment?—No; but it may be, and it is generally a motive for extenuating circumstances.

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3208. There is a kind of premium in most countries, as well as in England, for promptitude of confession?—I do not know exactly.

3209. Where there exists punishment short of the punishment of death, you never exclude all hope, do you; even a man sentenced to hard labour for life has the possibility of his sentence being lightened, has he not?—Yes; after 20 years, but not before. Generally for every penalty half of the penalty must be executed; say that the sentence is for ten years, before mercy intervene the man must remain in prison for five years.

3210. (*Mr. Hardy.*) I suppose that the crime of infanticide in France is generally in the case of illegitimate children?—Yes; generally. It is very seldom that a legitimate new-born child is killed.

3211. (*Mr. Neate.*) What is the limit in time as to registry?—Three days.

3212. (*Mr. Justice O'Hagan.*) There must be three days before the registration?—No; a child must be registered in the three days, but it may happen that, instead of being presented to the mayor, it will be concealed, and the child may be killed after that; as long as it has not been registered and may be reputed new born, its murder is an infanticide.

3213. It appears that the same punishment would be given for killing a child before the registration and after it; it would be equally capital?—Yes. Capital Punishment is inscribed in our law for infanticide. Now what is infanticide? Our law says nothing about it, except that it is the murder of a new-born child. Now what is a new-born child? There are various opinions, and it may be extended from the birth to two or three days and even to a certain time.

3214. (*Mr. Hardy.*) The finding of extenuating circumstances does not fix any absolute punishment to the offence, but the Judge, I suppose has a discretion between the different amounts of secondary punishments?—Exactly; but within certain limits.

3215. As for instance, between 20 years' imprisonment, and imprisonment for life?—Yes; and even more.

3216. It takes away the higher penalty of the sentence of death, but it gives a limit between a sentence for life and five or ten years hard labour, whatever it may be?—Yes; there are several penalties which may be inflicted according to that scale; there is first the penalty of death; immediately under, hard labour for life; after hard labour for life, hard labour for a time; hard labour for a time may be pronounced from five years to 20 years. When the jury find extenuating circumstances, the right of the Judge is to diminish the penalty of death in one or two degrees; if in one degree it is hard labour for life, if in two degrees it is hard labour for a time—from five to 20 years.

There is, perhaps, something to be said about the power of finding extenuating circumstances as left to the jury. It is asked whether it might not be given to the Judge himself instead of to the jury; I think that it could not be, because the jury could never know beforehand what would be the sentence or the opinion of the Judge. By depriving the jury of their discretionary power, we should come back to the old system of the omnipotence of the jury, and certainly a barrister would always plead that—"Make your affairs yourselves—you have to judge "the man—you do not know what will happen when your verdict is "pronounced, you have only to answer for your verdict to God and to "yourselves." The barrister would say, "If you are afraid that this "man may be sentenced too severely, you may provide for it and

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" answer as you like ;" exactly the same language as before. Our law has had exactly this view, to give its power respecting the punishment of death especially to the jury, and to permit the jury to make the application of the penalty of death or to abolish it in every particular case. It would certainly be against the theory of our law to give that power to the Judge.

3217. When you are acting as an advocate for a culprit do you see him yourself, or have you anybody between you and him ?—Nobody ; we see him ourselves with the greatest liberty.

3218. In England the advocate never sees him ?—I know it.

3219. That is the difference between the practice in our countries—you have your negotiations and your interviews with the prisoner himself ?—Yes, and for my part I think that it is much better, and more in harmony with the ends of justice, because if we see a man several times we know all his life and feelings, he is no more an indifferent being to us, and in fact we become devoted to that poor man, thinking that he may be innocent, or if not that he may be repentant.

3220. (*Mr. Ewart.*) If a man is too poor to pay for a lawyer, has he any counsel assigned to him by the Judge ?—There is a counsel assigned to him by the Judge, but also he may make choice of a counsel himself, and I do not know an example of a barrister making an objection to accept the defence of a poor man for want of money.

3221. (*Mr. Justice O'Hagan.*) When a counsel is assigned by the Judge is he paid anything out of the public funds ?—No, he is not paid by anybody, it is gratuitous.

3222. (*Mr. Neate.*) You have said that a poor prisoner generally has a counsel assigned to him, but is it not universally the case ?—Universally, not generally ; a man tried before the *Cour d'Assises* must have a counsel given to him several days before, at least five days before; all the proceeding would be void without it.

3223. In the case of a great trial in the south for murder, the prisoner rejected the counsel. He said that he would not have a counsel, and the Court said, " We must have a counsel to point out to " us any irregularities or defects of form which there may be in the " prosecution ;" was it not so ?—Yes.

3224. I refer to the case of Latour; he rejected counsel, but the Court said, " We will not allow that?"—There had been a counsel assigned.

3225. He had a counsel imposed upon him and he rejected him, but the Court said, " We will have somebody to point out any irregularity " or defect which there may be ?"—In every case a man tried before the *Cour d'Assises* must have a counsel ; it is not only a right but it is a necessity for the Judge to assign him a counsel.

3226. (*Mr. Justice O'Hagan.*) Do you mean in every case, great or small, whatever the charge is ?—Not in small cases before inferior tribunals where the *délits* are tried.

3227. Is it confined to capital cases—what is the limit to the assignment of counsel ?—It is not confined to capital cases, but to all crimes ; in capital cases there are always the first barristers in France assigned by the Judge when a man has made no choice himself, and in Paris it is generally the leader of the bar, even when there is no fee. The barrister sees beforehand the accused man; if the accused man says that he will not be defended at all, and that he will not permit the barrister to speak for him, it is for the barrister himself to know what he must do ; and I have sometimes seen a barrister addressing the jury in this way :—" That man will not be defended, you must examine the evidence " to see what you will do, I have nothing to add."

3228. (*Mr. Neate.*) You mean that sometimes the barrister will re-

nounce the right of defending the prisoner?—The barrister may do so; but he may do otherwise. He does not want a permission of the culprit to speak or keep silent. We do not submit to the control of the prisoner, but have a right of ourselves. I suppose a man whom we believe to be innocent, and who by weakness, despair, or otherwise, will not be defended; we shall not be accomplices by our silence of his premeditated suicide. Now I suppose, on the other side, such a man as Latour; he will not be defended; well, he gives us a capital opportunity not to speak.

3229. But in the case of Latour the avocat persisted in making the defence after Latour had rejected him?—Yes, perhaps the avocat was wrong, perhaps he was right. I do not know whether, in that case, I should have done the same.

3230. In that case the accused repudiated the barrister and said, "I will have nothing to do with you?"—Yes.

3231. But the barrister said, "In spite of that repudiation I persist "in defending you?"—Yes, it is an affair of appreciation. It is very certain that in some cases, if I were acting for myself, I should not admit an accused man to prohibit me from speaking, but in some other cases I should be perfectly right in saying, "I have examined the case, "and I do not find anything to expose to the jury—you have heard the "evidence—if you find that this man is worthy of extenuating cir- "cumstances or even that he is not guilty, you shall declare it, but for "my part I have nothing to say."

3232. (*Mr. Justice O'Hagan.*) Is there nobody in France resembling our attorney between the barrister and his client?—No; we have no attorney in France in criminal cases, only in civil cases. There is nobody between the accused and the barrister.

3233. (*Mr. Neate.*) Before a man is tried, what notice is given to the defender?—They give to him a copy of the depositions which have been made before.

3234. How long before do they give it to him?—There is no delay determined by the law; the minimum of delay is the time morally necessary to prepare the defence. We receive the depositions from three days to one month before the trial, and sometimes more than that, because in provincial towns there are assizes only every three months; and sometimes a case is ready long before the assizes are opened.

3235. What is the minimum notice?—Practically, I think, five days.

3236. The avocat is entitled to have the depositions five days beforehand?—I think so, but I cannot say exactly, because practically we have them much longer before.

3237. (*Mr. Justice O'Hagan.*) That is to say if a man is charged long before; but he might be charged the day before the assizes?—No; at least five days before. I must add that as soon as he has been interrogated by the President, we may take communication of all the procedure; it is true the copy of the depositions delivered gratuitously to the prisoner may be delivered later. There is a delay of five days between the interrogatory of the prisoner by the President and the trial, according to the article 309 of the *code d'instruction criminalle.*

3238. (*Mr. Neate.*) I understand that in order to subject *meurtre* to Capital Punishment, it must be either preceded, or accompanied, or followed by another crime. In the case of a duel, what is the crime by which the *meurtre* is accompanied. I mean in the eyes of the law?—I said that the law has no special disposition about duelling, and such was the opinion of the great majority of our courts of justice, and even of the *Cour de Cassation;* but M. Dupin, the Procureur-General, was of another opinion. In a very witty writing, when he was a barrister,

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he had said that if he were called to speak in the case of two men fighting with sticks, he would plead that it was a duel, and that, according to the doctrine adopted, there was no penalty for either of them. When he was Procureur-General afterwards, he said that he did not know any law of exception for duelling, and that when a man comes and kills another man in a duel, it is a murder, or an assassination, or another crime according to the circumstances of the fact; in other terms, he sees no difference between a duel and any other murder. That opinion was adopted by the *Cour de Cassation.* But the *Cours Impériales* are generally reluctant. They find a wide difference between a duel and a murder, and the law saying nothing about duelling, they conclude that it cannot be legally punished.

3239. In your opinion, according to the French law, is killing a man in a duel a capital offence?—It may be according to the doctrine of the *Cour de Cassation*, such as it is now.

3240. In the strict application of the law, as it is understood by the *Cour de Cassation*, killing a man in a duel is a capital offence?—It might be an assassination with the capital penalty, if the constitutive elements of assassination are found in the fact; that is to say homicide, wilfully committed, with premeditation.

3241. In the first place it is *meurtre*, is it not? It is a *homicide volontaire*?—Yes.

3242. In order to make the *meurtre* liable to the extreme penalty, it must be a *meurtre* preceded, or accompanied, or followed by another crime. In the case of a duel, what is the other crime?—There is a case where murder may be punished by Capital Punishment; it is when the murder has been accompanied by another crime; in the case of a robber who commits a murder, there are two crimes, and murder is punished capitally; but in other cases, where murder is not accompanied by another crime or by premeditation, it is not punished by the pain of death.

3243. I want to know in the case of a duel, assuming that killing a man in a duel is a *meurtre*, what is the other crime by which it is accompanied so as to bring it within the extreme penalty?—It is accompanied with no other crime.

3244. Then how do you bring it within the extreme penalty?—I suppose it to be accompanied by premeditation, though not preceded by another crime, and then it is an assassination; and, in fact, the jury must give an answer with respect to all those questions. A man who has killed another man in a duel is presented to the jury. I will suppose that there was a fair fight between them; the jury generally or always give a verdict of not guilty; but if instead of that hypothesis, the fight was not a fair one, and there was some treachery, the jury may find that there is a murder, or even that there is an assassination, because there may be not only actual will of killing, but premeditation.

3245. If they find that it is a murder *per se*, it must be either preceded, or accompanied, or followed by another crime in order to make it capital. In the case of a duel, what is the other crime?—There is no other crime.

3246. Then I understand that in the case of a fair duel the penalty is not death?—Not generally; but our law does not admit duel, and does not know it; therefore facts committed in a duel are tried according to the same rules as any other facts. But as, after all, a duellist is not a common murderer, and his case is morally quite different, the jury declare him not guilty; but they might pronounce him guilty of simple murder or of premeditated murder, or of wounding inflicted with-

out an intention to kill, according to the circumstances of the case. It is a question of fact, not a question of law.

3247. I observe that, by the law of 1853, the penalty of death was abolished for political crimes ?—By the Constitution of 1848. The law of 1853 admitted that an attempt against the life of the sovereign, or against the life of a member of the family of the sovereign, should be punished by Capital Punishment exactly as assassination. It is one of the few cases where murder is punished capitally.

3248. But setting aside that, if several men combine to overturn the Government, and go into the street and encounter the armed force of the Government, and they shoot a gendarme, is that a political offence, or is it assassination ?—You suppose that there is the death of a man in that case; it is an ordinary case.

3249. I am supposing that a certain number of men combine to make an insurrection, and that they go down to assault the Government with guns, and that in that assault they kill any of the civil or the military force, is that a capital offence ?—There are two different things in it. There is the political offence and there is the ordinary crime of homicide. It is generally difficult, when it is a public fact, to indict one of the men who were fighting as guilty of an assassination; but what happened in France was this—that a man was taken prisoner by the mob, and crushed and killed very barbarously. The men who did that were arrested when peace was restored, were tried, sentenced as guilty, and executed. It was pleaded for them that it was a political crime, but it was answered, " A political motive is no excuse for an " ordinary crime." And so when an attempt is made against the life of the sovereign, there is a political motive, but yet it is an ordinary crime.

3250. Supposing that I and 50 other men attempt to change the Government by violence, that is not in itself a capital offence ?—No.

3251. Supposing that I go, with 50 other men, and attempt to break into the Tuileries, that is not a capital offence ?—No ; it is to be punished, but not by death.

3252. Supposing that one of the inhabitants is killed, is that a capital offence against the man who has killed him ?—Yes.

3253. But not against the others ?—Not against the others ; except if it could be ascertained that they are accomplices of the man who killed the deceased ; everyone in that case acts for himself.

3254. And he is not responsible for the others ?—No.

3255. (*Mr. Ewart.*) Have you any observation to make upon the return from France which has been sent to this Commission ?—There are some errors in it. M. Treite did not know that political offences were no more punishable with death.

3256. (*Mr. Neate.*) Can you give us a definition of the difference between a *crime* and a *délit* ?—It is rather difficult to do so, because between a *crime* and a *délit*, there is in itself no specific difference; one is a crime, and in fact, morally, very bad, and the other is not so bad ; the distinction, according to our law, gives place to criticism ; a crime is what is punished by death, or hard labour, or reclusion, or deportation ; a *délit* is the fact punished by prison or by a fine.

3257. The distinction is not by the nature of the offence but by the punishment ?—Yes.

3258. Then you distinguish *crimes* from *délits* only by the punishment ?—Yes.

The witness withdrew.

Adjourned to Friday the 24th inst., at 12 o'clock.

Friday, 24th March 1865.

PRESENT:

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
MR. JUSTICE O'HAGAN.
THE LORD ADVOCATE, M.P.
HORATIO WADDINGTON, ESQ.
JOHN BRIGHT, ESQ., M.P.
WILLIAM EWART, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Rev. Lord S. G. Osborne.

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The Rev. Lord SYDNEY GODOLPHIN OSBORNE examined.

3259. (*Chairman.*) Your Lordship is Rector of Durweston, Blandford, in Dorsetshire?—I am.

3260. Has your Lordship given much attention to the subject of Capital Punishment?—I have for some years given a good deal of attention to it.

3261. Will you favour the Commission with your view upon the subject generally of Capital Punishment, whether it should be abolished or retained?—Will your Grace allow me to say that Mr. Patteson was kind enough to send me four questions to which he wished me to turn my attention? I thought it far better, as the Commission had called upon me to give evidence, to give my mind to answering those four questions, which I did in manuscript, before I received the evidence which had been already taken. Possibly in some part of what I have written down I might be inclined to make some alteration, on account of what I have read in the evidence; but still I abide by what I wrote first as the best opinion at which I could arrive upon the matter. I can either read it from the manuscript, or I am quite ready to answer any questions which your Grace asks me. I have struck out a good part of what I have written, for this reason, that on looking at the evidence which you have taken, I see that, excepting in one case, the religious question has scarcely been alluded to, and therefore I would not obtrude my opinions upon it, because it seems clear to me that the Commission, for some good reasons of their own, have not gone into the religious bearing of the question. My only reason for stating this is, that if I had left out the religious question of course in my own profession it would have been a subject for remark; therefore I have since bracketed it out entirely, and will merely allude to it in one short sentence: I have taken the first question, Shall Capital Punishment be retained or abolished? In my opinion it should be abolished. I do not think we are justified in the infliction of a punishment so awful in its consequences, and at the same time so irrevocable, upon evidence, which however strong in itself, however corroborated, being but human, must ever be liable to error. You do not hang a man because he destroyed the life of a fellow creature, but because he has been proved to have done so by certain rules of evidence, and under certain circumstances which that evidence proves to constitute what is held to be murder in the eye of the law. I assert that no nation in the present day would pass an Act to consign a man irrevocably to imprisonment for life, making it law that even if it could be proved he had been convicted on false evidence, on evidence which after consideration, aided by new facts, admitted of grave doubt as to its

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original value, he was yet to live out the full penalty of life imprisonment; I therefore argue that it is not just, it is not the action of a Christian state, to destroy the life of a criminal for any offence proved against him by mere human evidence, thus depriving that State of all power to rectify any error which might in the end appear in the legal justice of the conviction under which he suffered death. It may be said that the exigencies of civilized life require that such risks of failure in justice should be incurred, that all law being but human in conception, and human in execution, is liable to error. Up to a certain point I admit that, for the general good, even the innocent must submit from time to time to suffer, rather than that the guilty should have full liberty to pursue their life of evil. I would, however, stop short of a sentence utterly irrevocable when once carried out, admitting neither of arrest nor alleviation. You flog a man, or brand a man; the scars or the iron stamp him with the badge of indelible disgrace; yes, but if you afterwards discover that he was wrongly flogged or branded, you can proclaim the fact, you can further give him some compensation, in addition to thus relieving his character from unjust disgrace. For the hanged man you can do nothing. There is a short sentence to which I think the Commission will not object; I have not bracketed it out this morning, in consequence of one piece of evidence that I have read which they have taken, which bears upon the religious question. As for the arguments taken from the Bible to enforce or justify Capital Punishment, I never could for one moment admit their validity. Murderers, when God especially ruled His own people, directly interfering with their punishment for evil doing, were not always put to death; had they, from Cain downwards, been so, it would not alter my opinion. I take the four Gospels and the Epistles, not relying on this or that passage, but upon the spirit of mercy which breathes throughout as their common life; in that spirit I read forgiveness to all on repentance and faith in the common Redeemer. I only find one sin spoken of as without the pale of forgiveness, and it is one the ablest scholars have failed to define. We have retained Capital Punishment for the crime of murder, for all other crimes we find other punishment; I hold the opinion that murder, all-awful crime as it is, is not in all cases the crime which proves the criminal to be the worst man; its worst aspect perhaps is when it is deliberately committed for mere gain. If we take the convictions for the last 20 years, we shall, I believe, find that the majority of cases of murder are not cases in which the deed is committed for mere gain's sake. Jealousy, angered lust, revenge for some real or fancied injury are the most common causes leading to this crime; in a very large proportion of such murders the perpetrator was under the influence of liquor, was more or less excited by drinking. Jealousy is, of all causes, the most common cause of these deeds of violence. We may say what we will of the restraint over mere animal passion, which is the result of the state of civilization in which we live, the real truth remains, men and women, however refined by education, however restrained by outward circumstances, are yet, as male and female, subject far more than we choose to admit, to those violent, sometimes almost maddening impulses to which most animals are more or less subject, from the action of (I must use the coarse term) lust. Writing on so serious a subject it is better to be plain. That all-absorbing passionate instinct which leads man to seek possession, that overpowering feeling of jealousy which resents fancied, real, or threatened trespass on possession, will, who can deny it? at times so disorder highly-trained intellects as to induce a condition of feeling in which all life seems embittered, wanting that which is coveted, every feeling is driven into

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a state of dangerous hate against any who try to work as rivals to possess it; once possessed, should it appear to be tampered with to get it from us, or be disposed to cast us off in favour of another, the state of mere dangerous hate quickly, but too often, becomes one so maddening as to find vent only in some deed of violence. The murder committed under feelings excited by a sense of that injury which men feel when a wife or mistress dishonours or casts them off for some other man, and which men feel, with almost equal acuteness, when seeking either wife or mistress they see some other man prevailing where they fail, is very often the result of a prolonged torture of the mind, at last exasperated to a condition which the most powerfully trained intellect with difficulty restrains. In the case of the ignorant and brutish man, the mere animal bred, it acts with all the enraged instinct of a passion, similar to that which jealousy and lust engenders in those mere animals who under these feelings, by their very nature, seek to destroy each other. However dreadful the crime of murder may be committed under this provocation, in my poor opinion there are worse crimes, crimes showing a condition of mind more deliberately wicked. In dealing out Capital Punishment to all criminals convicted of murder, I hold that we confound every principle of justice, for we class all perpetrators of the crime as of equal guilt. We must very well know that this is not the fact, that in reality, although to the victim the issue is the same in one respect, there are many degrees in the guilt which led to his destruction; sometimes he himself by his own guilt had led to the very deed causing his own end. I do not believe that Capital Punishment is so deterrent, as it is commonly held to be. If it is true, that as the rule a man when his life is in danger will make every possible effort to save it, it is equally true that he will for ever be found exposing it to the greatest risk for very slight prospect of advantage. When death is inevitable and close at hand, it is usually met without the slightest exhibition of fear. I have, from circumstances, been present at the death hour of a very large number of my fellow creatures, only in one case did I ever see fear of death. The ignorant and ill-bred classes, from which so much of the nation's criminal stock is derived, set very little value on life; they risk it for the prospect of a very little present means of enjoyment, and this with the utmost deliberation. We had abundant proof of this in the days when we hung men yearly in dozens for what we should now consider mere trifling crimes. This class regard an execution simply as the normal end of one of themselves who has been unlucky; he has played his game, and lost; the cards were against him, hanging was on the cards. Hence the coolness which ordinary criminals show at their execution, and the brutal indifference with which the crowd views it. Gallows work they knew well enough to be a very probable end of the kind of man whom they see hanged; their only curiosity is to see whether he will play the game out bravely. This class admire in a fellow creature what they prize in a bull dog or fighting cock, pluck; they would despise the man who does not die game, and the man about to die knows it. A burglar knows that he will not be hanged for burglary, but he dreads the identification, especially if he has been previously convicted, which would lead to a long penal sentence; he is prepared to kill as well as rob, although he had rather rob and not kill. Probable murder, or possible murder at least, is more or less an element in every planned robbery, if detected in the act, to escape apprehension he does murder; he had beforehand calculated the consequence, should it be proved against him; it was on the cards. He goes to the gallows

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with all possible resignation ; he had long learned to expect that it might be his end ; he is quite familiar with every legal process from his committal to his appearance on the scaffold ; he is only "up" for what he has seen others go through ; friends who have been with him then are looking on now at him. As to the murders which are done under the force of an overpowering jealousy, under some present exciting provocation, or under the influence of drink, no fear of death, not were the rack to precede it, would have power to deter. There can be no doubt that there is, and ever must be, more or less uncertainty in carrying out prosecutions for capital offences ; and that even after conviction and sentence, the reprieve or respite of a criminal now and then on some special ground, may with the above uncertainty have some effect in decreasing whatever deterrent power Capital Punishment in itself seems to possess. I much doubt, however, whether in any case this uncertainty, this forlorn hope of escape, has ever yet acted to in any way influence a man about to commit a murder. I only except the cases of women about to commit infanticide, of whom I shall write under another head. I am satisfied that on the crowd witnessing an execution the effect is bad. If there is liability to error in the best of human evidence as to facts capable of proof on direct testimony, it is beyond all dispute that there is the greatest possible uncertainty as to the real value of evidence relating to the sanity of criminals tried for capital offences, for this in very many cases does not admit of such proof as can satisfy a jury consisting of men with little if any knowledge of a subject which requires deep study and long experience. I am quite satisfied that although in very many cases insanity is capable of rational proof as existing in criminals who may have been considered quite sane by those who have not studied the subject, there are yet a great many cases in which insanity does exist, of a nature leading directly to the commission of acts of violence, which it is next to impossible to prove in a way that would carry conviction to the minds of Judge or jury ; it may be of a nature so difficult to define, so occult, that even when one expert shall be clear in his mind that it exists, another of equal reputation may fail to see it. It is laid down by the Judges, that if the accused was, when he committed the act, in a state of mind sufficiently sane to know that it was an illegal act, and its consequences as such, he is not to be acquitted of the full responsibility of it. To my mind this, in effect, if carried out to the letter, would condemn many a lunatic, confined as such, who should kill a keeper or anyone else, for all men who are conversant with the ways of lunatics know well enough that they for ever do acts which they know to be wrong, the doing of which they well know to make them liable to punishment, and that they will take deliberate well-considered precautions to prevent detection. The action of disease on the brain is wonderfully eccentric ; it admits in no two cases of the same prognosis as to its probable effect upon the thoughts and actions of the person afflicted. In many cases a disposition to commit acts of violence will follow on a long period of perfect sane calm ; in others the violent outbreak is sudden, brief in duration, spasmodic, but very frequent, and yet between the attacks there is no evidence of anything like insanity, whether such an outbreak has appeared after a long or a short period of apparent sanity. Whilst it lasts life is not safe from its violent impulse to destroy ; no one can predicate on whose life the attack may be made. If a person so diseased in brain, in one of these outbreaks commits a murder, it might be proved that he had been subject to such attacks, and that they clearly showed temporary derangement ; still, if it was proved that five

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minutes before the murder the accused had been acting rationally, that he had been allowed to go about his daily business as a sane man, the jury would be charged to the effect that, although he had been subject to these outbreaks, which were said to proceed from diseased brain, as it was not proved that at the time he did not know right from wrong, and as he had been allowed to transact business up to the very time as a sane man, they, the jury, could not acquit him on the ground of insanity. Now I assert that in these cases, whether the accused at the time of the deed knew right from wrong, or not, he was irresponsible for his act, for under this peculiar action of diseased intellect, no sense of right or wrong, no fear of any consequences whatever, could influence him. There was so complete a mental and physical disturbance that he was powerless to arrest his impulse to destroy ; during the paroxysm all reasoning power was in abeyance, although half an hour before the deed, and an hour or two after it, it might defy all science to prove him then as anything but a sober-minded rational being. I have no doubt he meant murder, and knew what murder was. Juries have no difficulty in understanding the deliberation, the caution, the exercise of strong reason with which some suicides compass their own deaths, and see in it nothing inconsistent with existing insanity, and yet a wholly different view of sanity is taken in the case of murder. These outbreaks of violence, whether happening at long intervals or frequently, as the rule, at last end in a state of continued, most evident, insanity. I do not believe it possible to predicate when this, the natural end of the disease, from which they result, will supervene. At his trial the accused may seem quite sane, and he may have been so ever since he committed the crime. He is condemned. For the 16 days during which he may live, that is, to the day you hang him, he may continue calm and sane. No living man can say that if he had lived one other day the disease might not have again broken out for the last time as temporary, to hold him now for the rest of his life bereaved, beyond all doubt, of any reasoning power which could make him responsible for his actions. Had this last paroxysm preceded his trial, being yet after his committal, no jury would have denied that he was mad then ; they would scarcely question that he was so when he did the murder ; they would scarcely let the dictum, " Did he know " right from wrong," influence them. They would argue, " Whether " he did or not, who can say, for who knows what the moral sense of " a man mad is, whether mad for an hour or a life ?" Of late years the country has had abundant proof of the difficulty of bringing before a jury evidence as to the sanity or insanity of accused persons ; because great medical authorities have differed on the subject, Judge and jury are too apt altogether to undervalue psychological science. Seeing that in civil cases it is known that experts of great eminence can be retained on both sides to prove the case of plaintiff or defendant, in the criminal courts all such evidence is viewed with such suspicion that I have known it to be the wisest course not to call for any medical opinion at all. I lament that it is so, but I am not surprised. It is to my mind, however, a very strong argument against Capital Punishment, that you do put beyond all possibility of future proof the question whether the man who is said, on at least some fair grounds, to have been insane, was or was not so when he committed his crime. I am satisfied that we have hanged many insane people, and that we have let off, on the grounds of insanity, very many who never were anything but sane. That is all I have to state upon the first question.

3262. (*Mr. Bright.*) Have you had any opportunity of becoming much acquainted with the condition and habits of insane persons, or are

these opinions of yours rather the result of reading and thought than of any observation by yourself?—I have taken an interest in cases of insanity, I may say, for upwards of 30 years of my life. I was for some years, I cannot say for how many, one of the inspectors of Denham Lunatic Asylum, a visiting magistrate inspecting it, and I took a great interest in it. I seldom miss any opportunity of visiting asylums, but in addition I have had reason to study the subject, especially of late, as the defence of an insane convict fell upon myself, as Mr. Waddington probably is aware. Therefore, although the time was short, I had not only to bring up all my experience and all my reading, but to go further into the subject for the purpose. I do not give an opinion before the Commissioners as an expert, but all my friends know that I have studied the matter; from peculiar circumstances I have had to study disease of the brain, but not in relation to any individual criminal, except the unfortunate man of the name of Preedy to whom I have alluded, whose defence I undertook, and who was tried in irons.

3263. Have you not very much turned your mind to questions of medicine and surgery, and sciences which lead in the direction of the inquiry upon which you are now being examined?—Most certainly I have. I believe that it is generally known amongst my own rather large circle of friends that I have been studying those subjects all my life. Of course I do not pretend to give a scientific opinion. I have studied those subjects, and have been much appealed to upon them, but I of course do not put before the Commission that I have any right to claim to be heard as a scientific man.

3264. (*Mr. Waddington.*) What you contend is, that if Capital Punishment were abolished and a secondary punishment were substituted, it would be very immaterial whether the jury made a mistake or not as to the sanity of the person who committed the offence?—It would be comparatively immaterial.

3265. Because afterwards he would be carefully examined?—Yes.

3266. And if he turned out to be insane he would be confined in an asylum just as he would have been if the jury had acquitted him on the ground of insanity?—Yes. I communicated with the Home Office upon the case of the unfortunate man Preedy, and you could not have had a more singular case. I knew nothing of the man whatever until about six days before the trial. I accidentally heard circumstances which lead me to believe that a witness in the case of a comparatively rich man to be tried for murder had been abstracted, and that he had retained some of the first counsel upon the circuit for his defence. This poor man had no counsel retained for his defence. I was subpœnaed upon another trial, and I merely told my own solicitor to give some counsel a brief to watch the case. I had no intention then of going any further. It got known. Certain information was sent me; having undertaken the case I was bound to see how far the information given me was true. I traced out his father; he was a man of considerable means and position,—the man was a natural son. I employed the police and other agents at a large expense. He had been struck a blow upon the head when a child by a parent, I did not know which, and from that time he had been a strange being all through life. I traced him in the army and elsewhere, till I got the strangest life that I ever knew. There were circumstances which made me hesitate to force his father into court. I did not think that his evidence would have saved the man, but I did resolve to bring the mother into court. I had her brought down from London, and got from her half an hour before the trial that he had had this blow, and had been senseless for two days, and from that moment had been a

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strange child. I went to court at that time with no means of examining his head; the woman in court pointed to the boy, and she told the story, and said, "the scar is under his hair now." After he was hung they wrote to me from the gaol that they had shaven his head, and that there was this positive proof of a blow which might have produced injury to the brain. It was my duty to do all that I could to save him, and I did it to the last. If you ask me whether I regret it, it would be very difficult for me to answer; but it was a very peculiar case. I was consulted whether his irons should be taken off after conviction; he was kept in irons, and he was executed in irons by my advice, although I believe that I was the only friend that he had in the world. I am satisfied that it was a sort of epileptic form of insanity. I saw him overpower five or six men when in irons, and break the handcuffs. I am perfectly convinced that between the paroxysms he was as sane as you or I, but I am convinced that if he had lived for five years the number of successive paroxysms would have reduced him to the state of a positive maniac, because I had a similar case in my own parish, and I recommended the authorities to shut the man up as a lunatic, and he died a maniac afterwards.

3267. In the case of Preedy was not there a strong conviction in the gaol that he was shamming?—Undoubtedly. I believe that the gaol authorities were honest but were mistaken, for this reason,—he tore all his clothes to pieces, he defied them, and he was days and nights I believe perfectly naked in his cell.

3268. (*Mr. Justice O'Hagan.*) What was the nature of the murder which he committed?—He stabbed a warder.

3269. (*Mr. Waddington.*) It was a most deliberate murder, there was no provocation?—I suppose so. I had only six days to prepare for the trial. Whatever may be the result of this Commission, I trust that we shall not be more than a year before some means are taken to give to pauper persons put upon trial for their lives counsel and solicitor. The Judges invariably call upon a junior counsel to conduct the defence, but there is no opportunity to investigate the case. I had no power to trace these facts beforehand. I have no doubt that the prisoner, the "Gentleman Jack" as they called him, was a desperate fellow; other convicts had told him in joke that he was going to be taken up for murdering his mother; this exasperated him.

3270. There was no provocation on part of the warder?—Not at all; he liked him. I am convinced that he would have murdered me. I can name two cases in which there was the same form of disease, I succeeded in shutting them both up in asylums.

3271. (*Chairman.*) I understand you to say that the condition of this man's mind was so extraordinary that supposing Capital Punishment to have been abolished you would hardly have known what to have done with him?—Of course that is for the executive and not for me. If Sir George Grey had asked me to certify that that man was a lunatic, I should have certified that he was subject to epileptic seizures, which during their brief continuance are so like lunacy that I cannot state the difference between the two. He was for a time following his business; but if that man had not been executed, and if a secondary punishment had been inflicted upon him, I have no doubt that he would very soon have proved his madness. These cases are just the cases which puzzle us all.

3272. He would have been one of those men who would be very difficult men to deal with in secondary punishment?—In any place, even as a lunatic at Broadmoor or a prisoner at Pentonville, he would have been a most difficult case. I have never met with such a

peculiar case as his; he had a fancy for pets; he had some sparrows, and he cried for days because one of them was killed; there was a softness of heart about the man. I could not have certified him as mad. A vast number of papers were sent to me to prove his lunacy, but I did not believe them to be honest. I believed that they were cooked. Persons heard that a nobleman was defending him, and they got up these documents, and sent them to me by the post. I could not prove them to be genuine, and would not produce them in court; but if that man had had a solicitor and a counsel retained for him, instead of his being left to take his chance, and its coming upon me, I cannot say what the upshot would have been.

3273. (*Mr. Bright.*) Did the jury recommend him to mercy upon any ground?—No. One of the prosecuting counsel said to me, "My "Lord, you have saved that man's life." I said, "No, I have not, Sir;" because a man had been convicted the day before of a murder, who had retained Dr. Tuke, the expert in lunacy, and there had been a long discussion in court, and a considerable bullying by counsel, of what they call the mad doctor, and I was therefore perfectly satisfied that a jury having convicted the one man, it was a poor chance for Preedy.

3274. (*Mr. Waddington.*) It was the rich man that you have mentioned who had Dr. Tuke down?—Yes.

3275. He was, I believe, convicted for the murder of his brother?—I think that it was a nephew.

3276. (*Mr. Bright.*) Was he hanged?—Yes, both of those prisoners were hanged. I was present at both trials.

3277. (*Mr. Waddington.*) The same defence was set up, and in vain in both cases?—Yes; and I firmly believe that that man was equally a lunatic; that he had a diseased brain; he would shut himself up in the dark, and do other strange things.

3278. He had lucid intervals?—Yes. I told my own counsel and solicitor, "I am perfectly satisfied with the verdict as the law now "stands; however much I have worked against it, I cannot say that it "is not a fair verdict as the law now stands." But in my experience I have frequently known lunatics hiding things, and they have taken just as much pains to avoid detection as a man would in the case of a burglary, and they have shown just as much shrewdness.

3279. (*Chairman.*) Supposing that that man had been convicted of burglary, and that it had not been a question of Capital Punishment, you would not have had the same difficulty in knowing what to do with him?—Of course he would have had to undergo his sentence at a gaol where there was a medical staff and where there were warders, and if he had an outbreak of lunacy, I presume that he would have been sent to Broadmoor.

3280. Then I gather from what you have told us that the great objections which you have to Capital Punishment is its irrevocability?—Its irrevocability; that you have no power to reverse the sentence upon the production of evidence which may have been held back. All human evidence is liable to fallacy more or less, and to error occasionally, and where the capital sentence has been carried out you cannot repair it. Perhaps the Commissioners will allow me to mention a case in which Sir FitzRoy Kelly was concerned, the case of Adams, who murdered his father at Aylesbury. I was visiting justice at the time, and chaplain to the sheriff. I knew of that man's confession in the middle of his trial for the murder; I held myself absolved, by my position as chaplain to the sheriff at the time, from taking any part in the matter. The confession of this man, if I recollect rightly, was to the following effect. The evidence which would have convicted him

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turned upon a certain pocket book which he stole from the father in the hovel where he murdered him, and which he hid under the tile of a particular building. He confessed to a man under sentence in gaol for fowl stealing; the tiles were searched, but the pocket book was gone. After 15 hours trial the man was saved by Sir FitzRoy Kelly's efforts. Mr. Baron Parke said to me, "Are you a magistrate "for the county?" I said, "Yes." He said, "That young man must "not escape altogether, though he has escaped death." I mentioned this to other magistrates; they arrested the man for robbing the body; they tried him; and that same pocket book was produced in court in my presence, having been retained at the trial for murder by one of the parties conducting the prosecution, in order that there might not be a capital sentence.

3281. (*Mr. Waddington.*) It was not produced on the trial for murder?—No, it was purposely kept back. He was almost a boy, and the public feeling on the spot was, that he had lived on ill terms with the father, and that the father had lived on ill terms with him, and that it was just as likely that in struggling for the gun the father had shot him as that he had shot the father. It was only a short time since that Mr. Justice Byles was speaking to me of that case. I have no hesitation in saying that if the sentence had been the highest penal sentence short of hanging, we should have had that pocket book produced in court, and the man would have been convicted.

3282. (*Chairman.*) You have given us the grounds upon which you think that Capital Punishment should be abolished; but assuming that it is not abolished, have you formed any opinion upon the question of the classification of murder?—I have endeavoured to do so. Supposing Capital Punishment to be abolished, and seeing that it is now only carried out in cases of murder, the above question would at once become one calling for much consideration. It is also to me worthy of serious consideration, even if Capital Punishment is retained. There can be no doubt that many cases of clear murder are from time to time returned as manslaughter, because the jury feel that although they are not strictly such in law, yet from circumstances they are indisposed, by giving the graver verdict, to bring the prisoner to the scaffold; they feel he did murder, but they see reason to hold that he did so with some claim for a view of his crime which shall extenuate its guilt. I own I cannot see my way to any scale of guilt in connexion with this crime that might not be open to abuse, which would not for a certainty be most difficult to lay down with anything like justice. In my opinion there should be one sentence in every case of murder, but at the same time I think that some more clear distinction between what is murder and what is manslaughter might be laid down by law. I would sentence every man convicted of murder to imprisonment for life, a strict and complete life separation from the whole outside world. This sentence should be so far irrevocable that in no case should it be suspended except on some very strong and peculiar grounds, and then only on appeal made to authority above all suspicion, public and responsible to the nation. Assuming this to be the sentence, I would not object to give to the Judge and jury some power as to a decision whether with this irrevocable sentence there should be a scale of treatment under it in the prison varying according to the view taken by such Judge and jury of the more or less aggravated nature of the crime. The only way that I see by which this could be carried out would be to permit only two verdicts, the one simply "guilty of "murder," in the other case adding the words "with extenuating "circumstances," or leaving open to the Judge to "record death,"

which I think would be better in cases where he feels that death should not be carried out, supposing Capital Punishment is retained. If Capital Punishment is abolished there should then be an A and B class in the prison; in the former the diet should be somewhat better, the dress less obnoxious, and the labour less hard and irksome. To this class I would sentence all who came under the verdict which took the more lenient view of their guilt. If a prisoner became insane in the prison I would send him still to carry out his full sentence in the Penal Lunatic Asylum. To no class of prisoner would I, from the hour of his sentence, permit any intercourse with any living soul, by letter or otherwise, with the exception of the prison officials, reserving only to the Secretary of State for the Home Department the power at his discretion, in some very exceptional cases, to grant a temporary relaxation of this rule. It is my firm belief that were the construction and the details of the management of such a prison properly carried out, the committal of a criminal to it for the whole period of his life would have an infinitely more deterrent effect than hanging him. He would be at hand should, by any miscarriage of justice, his sentence be afterwards found to have been the result of false evidence; he would, though relentlessly excluded from the pity of his fellow men, be where he would have all opportunity of making his peace with God. There would be that in the nature of his punishment which would effectually bar him from making others think little of it, by seeing him exhibiting reckless insensibility to it. Since I wrote this, I have read the evidence which has been given before the Commissioners, as far as it was sent to me, upon the question of making degrees with regard to the crime of murder, and I am more than ever satisfied of the almost impossibility of doing so, without leaving an amount of discretion either with the Judge or with the Home Department which would be very great indeed; and it is my firm belief, from what knowledge I may have of the English character, that it is far wiser to leave that very wide discretion with either the Judge or the Home Secretary than it is to trust a jury to make their definitions under which class the crime comes.

3283. It would hardly come, would it, under the jurisdiction of the Home Department until after the trial?—No, it would not, excepting we went back to the power of the Judge to record sentence of death. Wherever he recorded it there is no instance, I believe, of the sentence being carried out. But this case might arise—he might have a disposition to record sentence of death and not to pass the capital sentence, but yet in the hurry and worry of a long trial in court I believe that the most practised Judge at the end of a wearying day would be put in a false position to have to make up his mind at the moment upon a case of such importance as the life or the death of a human being before him, and therefore I would still give the Judge the discretion where he was satisfied of recording the sentence of death, and where he was not so of sentencing the prisoner, but still, as I believe he does now, conveying to the Home Secretary his opinion if it was a doubtful case, that he had some doubts, but that the doubts were not strong enough to make him simply record sentence of death, and that therefore it was a matter for consultation for the Secretary of State with him.

3284. (*Mr. Waddington.*) That is the present practice?—It is. I do not say what London juries may be, but I am looking at the juries which I have seen in the country. I am taking illiterate jurymen, people who, because they happen to be rate-payers in our district, we put upon juries. You may have one or two intelligent men upon them, but I am convinced that if two or three murders were tried at the

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assizes, the jury of one day (for they talk of these things to each other) would puzzle the jury of the next if it came to a long charge and a nice distinction, and I think that it would be very difficult to carry out through such juries such nice definitions.

3285. (*Chairman.*) You still think that it would be advisable to make a classification?—Undoubtedly, if it could be done, for I can have no doubt that there are great degrees of guilt in murder.

3286. Would it not be possible for the Judge to lay down to the jury the question of fact, that if they believed certain things then it was murder, and that if they did not believe them, then it was only manslaughter?—But in that case there must be a line which the Judge must lay down.

3287. But it would be a line for the Judge to decide on, and not for the jury?—Then it would become no line, because it would in fact give the Judge the power of making his own line.

3288. Has he not that power to a great extent now?—To a very limited extent. *Quoad* the court, it is very limited; it is returned to the Home Secretary as conviction for murder. At present it would certainly be far better if the Judge had a considerable discretion. I believe myself that the English people would be quite as well satisfied to trust more to the Judge as they are now to trust so much to the Secretary of State, and I think that it would be happier for both sides. I have spent some hours in trying to classify and to make definitions; but when one has the cases in one's own brain which one has known of acts of violence, and the motives which have led to those acts of violence, and even the difficulty of defining the word "malice," I honestly confess that I cannot conceive the wisdom which could lay down a scale which would not leave a large margin on both sides.

3289. The same difficulty would arise whether you had or had not Capital Punishment?—But you would always have this, that when you have hanged a man there is an end of anything which may turn up afterwards. If there is a balance one way or the other, and the man is unhanged in gaol, there is the power of after investigation.

3290. (*Mr. Ewart.*) Do you not think that that consideration underlies almost every other, namely, the irreversibility of Capital Punishment, and the uncertainty of the finding of the jury; is not the irreversibility of the punishment that which acts most powerfully upon the jury?—It must naturally do so.

3291. Is it not the prevailing cause?—It would be the same if any human being was called upon to give an irreversible sentence. I should think a very long time before I would put a brand on a man's arm; but if you do so unjustly you may give him compensation for it, although you cannot take it off his shoulder.

3292. (*Mr. Bright.*) At present there is a sort of line drawn in the discretion which the jury has to bring in a verdict of murder or of manslaughter. That is not very well defined; but it is your opinion, if I understand you rightly, that if you attempt another definition not of murder and of manslaughter, but of two classes of murder, the difficulty will be much greater than we now find it to be?—I think so. I cannot see my way to it; I wish I could. At present I take it that the difference between murder and manslaughter depends upon the existence of malice; but the existence of malice would itself admit of a great many different degrees, just as much as we know that the question of murder is a question of a great many different degrees.

3293. And the question of malice is affected by the time which has elapsed?—Yes. I will refer to the case of Annette Myers. I happened with Lord Dufferin to be inspecting Newgate at the time of her trial. I

saw her going into court, and I saw her coming back to the condemned cell. I recollect saying to Mr. Davis, the Ordinary, "That woman will "not be executed." He said, "Oh, she will." I said, "I assure you "she will not; I am perfectly positive that she will not." I did not say so to any person in the gaol, or they would have thought that I had some reason for saying so. I saw Mr. Davis again the next day, and he was positive that she would be executed. There never, I think, was a more deliberate case than that; she bought the pistol sometime before, and came down and shot the man.

3294. (*Mr. Waddington.*) She was convicted?—Yes; but I am speaking of the degrees of malice. There was malice entertained for days. The woman took time upon it, slept upon it, and then went about it. Compare the malice of that woman's deed, who was not hung, with that of the deed of a man who seizes a knife and kills a person and is hung for it.

3295. That was with the executive, and not with the jury?—Mr. Bright put to me a question as to the differences of malice. I am speaking of the difficulty of making degrees of murder.

3296. (*Lord Advocate.*) Upon the question of classification, I understand you to think that it would be as difficult to classify malice as to classify murder?—It would be impossible.

3297. (*Mr. Neate.*) In the case of Annette Myers was not there some provocation at the time. Did not the soldier repel her rather contemptuously?—I do not carry the evidence in my mind, but at all events she came with the weapon with which she destroyed him, prepared to destroy him; very possibly there might have been a provocation. I do not find fault with that case, I only quote it as proving the degrees of malice which may exist, that there was in that case malice for days, and that in other cases the malice may be immediately before the deed, and that in each case you get a conviction.

3298. (*Chairman.*) There is another branch of the subject, namely, infanticide; have you given attention to that?—I have. In our district unfortunately we have to see and hear a good deal of it.

3299. Will you give the Commission the benefit of your opinion upon it. Do you think that infanticide should still remain punishable with death?—Certainly not. Can it really now be said that it is so? In nine cases out of ten, trying women for their lives for infanticide is a cruel farce. It is felt by all concerned that every effort will be made to reduce the capital to the minor offence. Even if this fails, and the jury cannot avoid or evade a verdict of "murder," no one for one moment believes that the woman will be executed. I believe that this crime has of late years fearfully increased; the public are little aware how common a crime it is. Very little pains are taken to detect it; hundreds of children are yearly born, and die, with no inquiry made as to the real cause of their deaths; very many are born, die, and are after death concealed, whose birth is never known beyond the mother, and perhaps one or two female relatives or friends. A very large number of these are actually destroyed by violence; very many are allowed to die by wilful neglect of all that could have saved them. The popular view of the matter is, that the mother of a bastard child has been seduced, deserted, and being driven to despair by shame, and the prospect of the burden which a child's support will be to her out of the workhouse, and her dread of the confinement which life within it will entail, urged by these motives, in a condition little short of insanity, she destroys it. I cannot admit the general truth of this view. I believe that as the rule there is very little of what is called seduction; that the woman, in real fact, deliberately shares the shame with the

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father of the child, well aware what the eventual consequences may be to herself, having very little if any expectation that the man will marry her. Throughout the rural districts, it is very true, a large proportion of marriages do take place when the woman is far advanced in pregnancy; this, to me, only proves how lightly the women will risk desertion in addition to shame. I do not believe that the child is always killed to save the mother's character, I hold rather that it is to avoid the burden of its support. A large proportion of these cases are those of young women out in service; they come home to be confined, leaving their situations frequently unsuspected; they have lived so well in service, that the cottage home, very often a very wretched and a very poor one, is a scene of misery to them; they are there at all grudgingly on the part of their parents; they know that if their child should be born alive, and live, they must go to rough work to sustain it, or must go with it to the workhouse; they either attempt to prevent its being born alive (they get plenty of teaching how this may be done), or they try to conceal their state, and then murder the child, or, failing this, they nurse it grudgingly for a while and then return to service, leaving it to be brought up by those whose neglect of it often brings it to an early grave. If murder is the deliberate destruction of a human being, unless we lay it down that there is an age when the progeny of our race have not arrived at a title to belong to it, I see not how the murder of an infant is legally less murder than that of an adult; if it is, I wish the Judges would lay down for our instruction some rule determining the exact age when this killing is murder. The grand jury always do their utmost to throw out the bill for murder. If they cannot, neither the prosecuting counsel, Judge, nor jury have any other disposition but still to try and reduce the charge to the lesser crime. If these cases were got up with the pains taken in the case of adult murder, and if the court received them in the same light, we should soon have an end of Capital Punishment. No civilized nation would endure the amount of execution which would follow. It may be said, that were the law strictly carried out in these cases, as in the case of the murder of adults, the crime itself would diminish in frequency. Possibly it would, but it is one of so peculiar a nature, it has existed with little real check for such a length of time, it is one so common in so many nations, and general consent seems to have so extenuated it, that I am satisfied extreme severity would very partially arrest it. I am afraid we must, in all truth, admit, that mankind generally are so far conscience stricken in this matter, that they feel a very natural reluctance to visit on the woman the full penalty of a crime in which themselves have antecedently much to answer for. Perhaps the Commissioners would allow me to add a case which happened at the assizes two years ago in Dorsetshire, which I witnessed myself. A woman was put up at the bar for trial for the concealment of birth; the moment she was brought to the bar she fainted away. Mr. Justice Byles was trying her, and while they were recovering her, he took up the depositions and he said to the prosecuting counsel, "Can you carry this case further than "you have it in these depositions? You have proved that that unfor- "tunate being had a child, and you have proved that a child was found "in a privy; can you prove that the child found in the privy was "the child belonging to that woman?" The counsel said, "I cannot "say that I can prove it." The instant the woman recovered the jury were charged to acquit her. It is evident to my mind that the general bias is in those cases to let off the woman.

3300. Surely that would only prove that there was no evidence to show that the child found was the child murdered by the woman?—I

believe if it had been an adult murdered, some attempt to carry the case through would have been made.

3301. (*Mr. Justice O'Hagan.*)—The child was found in the same house in which the birth had taken place?—Close to it. The woman was acquitted of the concealment; she was only tried for the concealment.

3302. (*Mr. Bright.*) With regard to those cases, if Capital Punishment was generally abolished for all murders, would it be possible to inflict on these women the punishment which you have suggested for other murders, namely, a severe imprisonment for life shut out from the world?—Certainly not. I do not think that Parliament would pass it.

3303. Then in case Capital Punishment was abolished you would think it necessary either to alter the law or to alter the practice with regard to classes of murder, defining infanticide and punishing it differently from the more ordinary and graver murders?—I can have no doubt upon that fact, but of course I see the dilemma in which you place me from what I have stated previously, namely, the difficulty of classification. I have no doubt that infanticide should be taken out of the category of murder, but having read the evidence given before the Commission I feel still more than ever the utter difficulty which there is in laying down where you should punish severely, and where you should not. In one statement I see that the age making the offence capital is put at three months. In our districts I am perfectly certain that this would not work at all, except for evil. Another most extraordinary piece of evidence, as it appears to me, has been given, namely, that child murder is not to be considered in the light of another murder, upon the ground that a child has not that value from its position in life which adults have in the world. If you allow that argument to prevail, what do you say of an idiot? or what do you say of a poor wretch who is rotting and dying in a hovel? or what do you say of a criminal who is to be hanged on the Monday but who is murdered by somebody upon the Saturday? You would get into endless difficulty. I am satisfied that for infanticide it is necessary that some change should take place. At present there is invariably sympathy with the crime.

3304. Persons who support Capital Punishment often complain that there is a great sympathy for the criminal, much more indeed than for the victim of the murder. Have you observed that to be the case, and if you have can you account for it?—When you say "sympathy," I have heard the term applied in the case of Müller. I do not call it sympathy. I think that there was a kind of false sensational excitement about it. I should not class it under sympathy.

3305. Have you not noticed that when a man is tried for his life and is under sentence of death there is almost always a much greater attention paid to his case and to him, and that all minds are filled with the idea of his fate, and that everything which he says and does is narrated with great minuteness and listened to with great attention. Does not that arise from the fact, not that he is a great criminal or that he is about to be punished, but that he is about to be punished in this particular manner, namely, by having his life taken from him?—Undoubtedly. When a man is about to lose his life by a public spectacle, he going through a long trial, and a number of the civil force of the country have been engaged in tracing out his life, and so on, there is no doubt that he would be a very great object of attention, whereas if the man is only to be transported the next day, all attention seems to be gone the moment he is removed from the bar, his subsequent punishment is not thought of.

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3306. Is it the fact that this morbid feeling, being perhaps in the minds of all persons, tends to deter from crime, or has an injurious effect especially among the criminal class?—I have no doubt that it has an injurious effect. Although I may be injuring my own view, I am here to speak what I think in all fairness,—I think that you must bring another element into the matter. The present literature of the day makes every criminal a hero; the lower class literature did it for years, but now the higher literature does it to a great extent. Every man put upon his trial for any great offence creates a great amount of interest. It is worth the while of the Commission to buy for one week the low papers which are circulated about London in order to see how every crime is dwelt upon, and to see how it is worked into sensational narrative. It may be ridiculous to us, but it is not so to them, and the effect is to make a criminal a hero.

3307. If the punishment was not capital, does it appear to you that the same attention would be paid to every minute detail, and that the minutest fact would be thus brought home to the whole population?—Certainly not.

3308. Do you conceive it possible, taking the million, and the least instructed people of this country, that they can read or hear of all those minute details without being injured morally, and, in fact, without having their sense of wrong and right in some degree impaired?—I have no doubt that it has that effect, that it does impair the moral sense of a certain class to a considerable amount; that the dwelling upon these capital offences, and even the accompaniment of the execution, produces that result. I do not think that the execution takes off at all the injurious effect, and the ingenuity with which certain crimes are committed I think makes a sort of "Jack Sheppard" history for that class. The effect, I think, is to reproduce the very crimes for which you hang men. That is my own firm belief, of course I cannot account for it.

3309. (*Chairman.*) Supposing Capital Punishment to be retained, would you be in favour of public or private executions?—Private executions, decidedly. On this point I have no doubt whatever. Admitting that the penalty of death for the commission of the crime of murder must have a certain amount of deterrent effect, it does not follow that the seeing the man or woman put to death adds to that effect in the case of those who are present. I am satisfied that in the public execution of a male criminal, as the rule, you hold out inducement for a display of recklessness, which acts prejudicially upon the said criminal, and the crowd who come to witness his death; in the majority of cases the sympathy is with the criminal, not with the law. The chaplain of a gaol where the executions are most frequent assured me that the publicity of the executions for which he had to prepare those who were sentenced seriously interfered with his efforts to bring them to that sense of their condition from which alone he could derive hope. In the case of the men, the feeling that thousands would watch them as they died, kept up a determination to act out a desperate show of hardihood, tending to harden their nature to the last. With women, he said, it added so fearfully to the weight of their sentence as to deaden every feeling within them, having borne the full exposure of the open court during their trial, a fearful ordeal to any woman, the having yet to look to an exposure, such as hanging must be to a woman, in the presence of a ribald crowd, formed so crushing an addition to their sentence, that from the moment it was passed it pressed them down with a weight of impending terror which made them helpless to listen to consolation. To strangle the life out of a

man before a crowd, who come to the scene as to a play, a crowd notoriously composed of those who are the very scum of mankind, who go again and again to such scenes, each time to pollute the very air with their fearful language, people to whom it is a sort of gala day, men and women blaspheming, singing obscene songs, with half drunken jollity coming to riot below the gallows, departing to follow the life out that leads to it, viewing the scene without one single display of one feeling which evinces sympathy with the law, screaming a kind of fiend's welcome to the hangman, a miserable wretch letting himself out for the work, groaning at, or, in their own way, encouraging the "victim," ordering "hats off" to "death," but damning each other's souls,—as they look upon it, in my opinion, the whole thing is as hateful in itself as it is an outrage on all the principles upon which alone it could be defended. If we must hang, let us at least do it with something like the dignity due to the carrying out of the law's most solemn sentence. Nothing can be more solemn. I know nothing which has so evident, so powerful an effect upon all present as the passing of the sentence of death; the solemn feeling language of the Judge who pronounces it, the almost suffocating feeling with which the awful words are heard, the utter stillness of the Court, followed by the shuffling sound of the feet of the officers and the prisoner, as they at once move him to abide his time, his short time, till called out to die—all this is, at least, in keeping with the majesty of the law. The day comes, I need not paint it again; how utterly in opposition to all that can give the least dignity to the scene is the hanging. I am satisfied that if you must hang you may so do it so as not to inflict upon the criminal all the disturbing cruelty of this disgusting exhibition, and yet act with greater awe on those who choose to witness the proceedings which attend upon his death. Let the execution be out of sight, the criminal seen to pass with the officials along a short gallery on his way to his doom; let the drop be so contrived that it shall be in connexion with a mast high above the gaol, to this attach a black signal ball in connexion with the drop, so that with its fall this black ball shall also fall. I believe that the watching the fall of that death signal would sober a crowd far more than seeing the death, after for hours they had been feasting their eyes with the scaffold. I believe that men and women would faint in the one case, who would look on hard to all feeling of awe in the other. Let there be a coroner's inquest on the body two hours after the execution. As for the folly which urges, "If the people did not see the man die they would not believe in his death," I have only this to say, we have long passed the day when justice could be so tampered with. Who ever doubts that the prisoner is in gaol, suffering penal servitude, unless in the regular course of law he has regained his liberty or is dead? There is one custom in connexion with this question which I have not touched upon, that of sparing the life of a woman pregnant until after her delivery, then taking her from her infant and hanging her. After the case at Chester a few years ago, I felt that public feeling would never again quietly submit to a proceeding so abhorrent. Since I began to write these observations and opinions on Capital Punishment one of these cases occurred, and the woman has had her sentence commuted to penal servitude for life. I am inclined to ask whether if a mother of several young children had been convicted and sentenced in any civilized Christian country she would have been allowed to have her children with her till the day of her hanging, and then, only then, had them dragged from her? If to save the unborn life you suspend the operation of the sentence, how deeply do you add to

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the torment of that sentence when you take pains to guard the mother through the peril and pain of her delivery only to hang her as soon as she is able to walk to the scaffold. Does the chaplain read the service for churching close upon the portion of the burial service read at executions?

3310. (*Mr. Waddington.*) In the last case at Chester the woman was pregnant, and the trial was put off in order that she might be delivered before she was tried?—Yes, and then she was taken from her infant; but still the law, I believe, is as I have stated, though it may not be practically carried out.

3311. (*Mr. Neate.*) Do you take the description which you have given of the scene at an execution from your own observation?—I have never seen but one execution.

3312. Did it at all come up to your description?—It did. I will speak within limit; I do not believe that it was quite so bad; the execution which I saw was at Oxford; but I have had means of talking with persons who have been present at executions.

3313. What execution was it at Oxford?—I do not recollect the man's name; it was for a murder on the road near Henley. Of course I have taken my description of an execution from the evidence which has been given on all sides.

3314. (*Mr. Waddington.*) The description would rather apply to a London execution?—Yes.

3315. (*Lord Stanley.*) Of course in proportion to the amount of the population the scene would be more discreditable?—According to the nature of the population. I cannot say that any such scene occurred when poor Preedy was hanged, because we are a very rural population; people went in carts and vans from all parts; it was a show day; but I do not think that in our villages we have so hardened a race; it was a different thing altogether.

3316. (*Mr. Ewart.*) A few weeks ago at Durham when a prisoner was executed a dreadful scene occurred by the breaking of the rope and hanging the man by another rope; it seems to have been altogether a terrible scene. Do you think that such scenes would be endured by the people supposing that the execution was a private one; do you not think that popular discontent would be so manifested that it would scarcely allow of such scenes being permitted?—I am bound to presume that that was an accidental circumstance. I may be told that there was want of care somewhere as to testing the rope; but that is a case which might occur at a public or private execution. The following happened at the time of the trial of Tawell. I had been a visiting justice a short time before. In consequence of a death, under peculiar circumstances, in the gaol at Aylesbury, Lord Normanby sent down Mr. Whitworth Russell with me to inquire into the circumstances. By mere accident I happened to inquire how prisoners were executed at that gaol. The instant Tawell was convicted I wrote to Sir James Graham privately, and begged him to have a proper scaffold. Sir James Graham kindly wrote to me thanking me for the warning. I referred him to a note which I had sent to Lord Normanby. About a few weeks afterwards Sir James Graham sent me a note in which he thanked me for having relieved him from any responsibility as to the scene which had occurred at the execution. I have both Sir James Graham's letters in my possession; but still all this does not seem to me to touch the question of Capital Punishment, but the question of properly carrying out the sentence.

3317. (*Lord Stanley.*) Of course it must be assumed that if Capital Punishment is retained, the authorities are capable of seeing that it is

carried out in a decent manner, and without unnecessary torture ?—The responsibility is upon them.

3318. (*Mr. Waddington.*) You are aware that the old common law prevails, and that the Government does not take any part in an execution, but that it entirely depends upon the sheriff ?—Yes, and therefore it depends upon a man being hired instead of a Government officer carrying out the sentence, in the latter case you would have some sort of decency.

3319. Should you consider that the law might be amended in that respect ?—Most undoubtedly. If you preserve Capital Punishment, I think it is absolutely necessary. If you will hang people, I think that there should be more dignity in the actual execution ; but at present there seems to be no precaution whatever ; it is left to a man who may be drunk or who may be sober, which makes it more disgusting.

3320. The Government provides everything up to the sentence, and then retires from the scene and leaves it to an annual officer who performs the duty without any peculiar law to guide him ?—Yes.

3321. (*Mr. Bright.*) Have you other notes which you would like to lay before the Commission ?—I have some notes here, but I merely made them upon reading the evidence which was sent me. I just wrote down what the impression upon my own mind was, where it was all leading to, and what were the difficulties. It is only my individual opinion ; it is merely what struck me as to the difficulties which surround the matter. I had written the whole of what I have read before I saw the evidence, and I have not altered it.

3322. (*Mr. Waddington.*) Are your views modified by reading the evidence of the other witnesses ?—No. The notes which I have made are upon the difficulties which appear to me by the evidence to present themselves every day to the Commission. I gather from a perusal of the evidence taken before the Commission that those who desire to retain Capital Punishment do so, not from any idea that hanging a man for murder is desirable, if the result which they argue to follow from it could be arrived at by any other means, but because as yet they are not convinced that such means exist. They plead that man would undergo anything rather than lose life ; that murder is a crime so affecting society as to make the only check to it fear of the loss of that held to be most precious ; therefore they see their only course to be to hang for murder, because hanging is the punishment which will prove most deterrent. Rather than lose his life, they argue that the man inclined to murder will hold his hand. They admit, however, that there is the greatest difficulty in defining what murder is. Many of them further admit that, assuming the present legal definition of the crime to be the best at which we can arrive, still with regard to murder thus defined there are many degrees in the character of its guilt. They do not deny that if there is difficulty in giving a *primâ facie* definition of the crime, there is ten times the difficulty in adjusting weights for the scales of justice to determine these degrees. Granting it possible to arrive at some data from which a scale of guilt in this crime could be laid down, so as to decide in which cases of conviction death should be inflicted, and where some other punishment should be substituted, the difficulty then arises, to whom is to be entrusted the actual ruling in each case ? Shall the jury say, "This is a hanging case ?" This, it is argued, would in fact do away with hanging, except, perhaps, in most atrocious cases, for, as the next punishment on the scale must be so severe as only to be just short of death, the juries, to escape sending the prisoner to the gallows, would as the rule find for the secondary

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punishment. Would you leave it to the Judge? It is argued that Judges are just to the best of their ability in all trials, and yet nothing can vary more than the sentences which different Judges pass for the same crimes. What security would you have that a murder in the same assizes should not be treated as death-worthy on the Southern Circuit, whilst one of the exact same complexion, nay, perhaps of a blacker dye, was allowed to pass into the milder balance on the Northern Circuit? It is argued that the secondary punishment should be one deterrent in the next degree to that of death. As murder is worse than the worst of any other offences, this secondary punishment must not be less, and should be more severe, than any inflicted for any other offence. It can hardly be anything then but penal servitude for life. But it is argued that the public would not bear with imprisonment for life; that prisoners so dealt with would go mad; that the life of no warder would be safe from men made so desperate, &c. &c. Under any rational definition murder is the destroying the life of a human being wilfully, with malice. If there is no difficulty in understanding what "wilfully" means, it is not denied that "malice" is hard of definition. Witnesses almost one and all are against hanging for infanticide, for the murder of very young children, but few can say exactly what is an infant, or what is to be considered the very young child. One of good authority finds it difficult to say what shall be the age too young to hang. If the child unseparate is not to be considered a human being murdered, it is telling mothers that they can be rid of their burden under themselves the easiest and to it the least cruel terms, and be not guilty of murder. If it is first a living child when separate, and if to destroy it is not murder until it is three months old, why that age? No reason is given. One is given for not hanging for infanticide, whatever that may be, namely, that a thing so young has not attained the position in the world which gives to its life the full value of human life; but this is making the crime depend on the status of the being killed, the loss to it of this world's value by death. So measured, what would be the value of the life of an idiot? an old imbecile man, already dying, &c.? Suppose the murder by a warder of a prisoner who was to be hung the next day. Then we have an inclination shown to absolve the mother of an illegitimate child of the full guilt of murder, although it is clear that she is held to be just that mother who is most likely to commit the crime. Very naturally this raises the question, Is a midwife, is the father of such a child, to be so absolved? Supposing, as often happens, that the person acting as midwife should be the mother of the woman confined, who, to a certain degree, is affected by her shame, is she to be absolved? The father if a married man has great inducement to compass the destruction of the child, is he to be absolved? If these are to be, how is a secondary punishment to be formed in their case equal to the enormity of the crime which would not as a "deterrent" be equally efficacious in all cases of murder? There seems to be no dispute as to the necessity of a power resting somewhere to remit the capital sentence or commute it, should there appear to be rational cause, but there does not seem to be any better plan proposed than either to leave that power where it now is, with the Secretary for the Home Department, or to give the presiding Judge (at the trial) power to at once record sentence on the old plan instead of passing it. In this latter case it is presumed that he would only do this when the evidence then and there satisfied him that it was right to do so, that is to say, in cases which clearly would be commuted by his own representation to the Secretary of State. This would still make it necessary to leave with the Secretary of State the power which he has in cases where to the Judge at the

moment there appeared no grounds for remission or commutation, such grounds coming to light after the sentence. There is difference of opinion as to the deterrent effect of the public execution, and I think that I gather from the evidence an inclination to yield to the wishes of those who advocate private execution; but as I read the evidence, whilst there is difference of opinion as to the deterrent effect of Capital Punishment, private or public, those who are against its abolition are so on the sole grounds that they see their way to no substitute for it, to no punishment sufficiently severe to make men abstain from this crime from fear of it. Yet it is said that punishment by imprisonment for life is so dreadful to contemplate that the public would not endure it. The public already endure it in the case of some commuted sentences, 15 or 20 years of penal servitude being a common sentence without regard to the age of the criminal, and therefore necessarily often, on the face of it, being a sentence for his whole life.

3323. (*Mr. Bright.*) With regard to the fewer murders which take place in these days from the general greater reverence which there is for human life, and from its being considered sacred in comparison with the feelings of past times, do you suppose that the putting to death of a man in full health in the view of a great public assembly, or even if the execution takes place in private, does not tend really to impair the reverence for human life, and therefore to lessen one of the greatest securities which we have for its preservation?—I must of course answer that question from my own point of view; my opinion of the reverence for human life is, that it is not life viewed in the same light as the life of one of the lower race, but that it is the life of a being having eternal hopes which the lower race has not; therefore if you put a man to death at 14 days' notice, when the reverence which we have for his life is grounded on what his future state may be, and he may thus die without hope, I feel an execution to be unjustifiable.

3324. Admitting, for the sake of argument, that Capital Punishment is at least as deterring as any other punishment, and even admitting that possibly it may be more so in some cases, do you consider that the disregard for human life which is shown by an execution in some degree amongst the mass of the people tends to impair their reverence for human life?—I think that with every thinking man, and not only with the mass, it must have that effect. If we believe that which the majority of us profess to believe, we can conceive nothing more dreadful than cutting short a life which is given for a certain purpose. You must excuse me if I take my professional view, I must do so as a clergyman. I have looked at the subject so much from that point of view that my reverence for human life consists in what human life may hope to be in the state to come. If you look at human life as that of a beast it may prevail little, for there is then no reverence to impair.

3325. Is not the act by which the law destroys a life the same sort of act as that by which the murderer commits his crime. The circumstances may be different, but the murderer destroys life and the law destroys life?—But I could not impute to the law malice or anger in doing it. The mechanical act is the same, but not beyond the mechanical act, so far as I can see.

3326. Does it appear to you that the taking of life by the law can by any possibility, to the great mass of people, make the destruction of life by an individual more to be abhorred, or the contrary?—You put it to me whether the great mass of people seeing the law deliberately take a life, it does not put a diminished value upon life, so far as other persons may view it? Upon educated people, who would of course

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take the religious view, there would be this ill effect, they would say surely Christian legislators can scarcely believe what they profess to believe and hold life so cheap; but when you take the great mass of people, I do not think that that argument would affect them much. I do not think that they have sufficiently thought of the value of future life to give it weight. I wish that I thought that they had.

3327. In the course of your reading do you not recollect that the Fathers of the Christian Church objected greatly to the gladiatorial exhibitions, because they produced a savage disregard of human life amongst those who witnessed them?—I shall be thought to say a strange thing, but I think that if Sir Richard Mayne was here he would justify me in it. Those gladiatorial exhibitions were great exhibitions of bloodshed. It is very curious how much human nature will witness of cruelty without bloodshed, and yet shrink from the least bloodshed. I am satisfied that if you were to arm the police of the country with cutlasses, and if bloodshed was the effect of stopping a row, it would create a riot, whereas mere bruising would not. I am satisfied that England would not stand the guillotine, while it does stand the gallows; I cannot say why, but there is in England, especially amongst the lower orders, with regard to bloodshed, a peculiar abhorrence.

3328. (*Lord Stanley*) It has an effect upon the nerves?—I cannot account for it, but it is so; I think that every man's experience will tell him so.

3329. (*Mr. Bright.*) My question had reference to what we know from history was charged as the result of those exhibitions in ancient times. The same may be said of a time of war, as, for example, the time which is now passing in the United States; and I think that you have seen a good deal of mischief, if not in the Crimea, at least in the hospitals at Scutari?—Yes.

3330. In times like these is not human life much less valued; when you hear more about men being killed, do not people care less about it as they hear more about it?—Whatever we get familiarized with we think less of; but when you take, say, an army in war, it is men risking life professionally, and lives are risked every day for pleasure. When men go to a steeple chase they do not count the chances how many riders might be killed.

3331. If men are familiarized with violent death, even though it be under the sanction of the law, does it not tend so much (I cannot say how much) to make the destruction of life by violence a thing somewhat more familiar to them, and therefore possibly less to be avoided and shunned?—Of course all familiarity with executions must, more or less, act in the way which you state; but strong advocate as I am for the abolition of Capital Punishment, I cannot say that I could fairly deduce from the hanging of 22 men in a year spread over all England that it produces a lower sense of the value of life; I cannot conscientiously say that; I do not think that the executions are sufficient in number to do so.

3332. Has it ever occurred to you that when a man is hanged, besides his own punishment, his family and even his descendants, but his then living family, are subjected to a fearful suffering, which to a great extent they would be spared if he was subjected to some secondary punishment short of death?—Of course I can only take the average of criminals. If I take the class to which the average of men who are executed belong, speaking from what my memory would recall or from reading, I am not sure that there would not be eventually less suffering to the family if the man was out of the world than by their believing

that he was working out a life in penal servitude, and that appears to me to be one part of the deterrent effect which penal servitude would have. I think that the very fact of feeling that a father or brother was shut out from every possible communication would cause greater suffering to the family. I think that the families of the criminal class would bear an execution with a certain amount of philosophy or calmness and resignation, but if they knew that there was a particular building in which their father or brother was shut up for life, they would always be open to considerations of how he was treated, or whether he was cruelly treated, I think that the effect would be more deterrent upon them.

3333. It has been stated here that the majority of murderers are not members of the criminal class, and some of them have families and friends in a position in life very much more likely to feel the acuteness of any such misfortune ?—I admit I used a wrong term ; I do not say that all murderers are criminals, because I think that it is a very curious fact how few positive criminals commit murders. Murders are usually committed under other feelings, such as lust or jealousy ; by persons, however, chiefly of the class in life of our criminals, though not known to be themselves criminals.

His Lordship withdrew.

GEORGE YOUNG, ESQ., examined.

3334. (*Chairman.*) You are Solicitor-General for Scotland ?—Yes.

3335. How long have you held that office ?—About two years and a half.

3336. Previously to that time how long had you been at the Scotch bar ?—I have been about 24 years, I think, at the bar now.

3337. Therefore you are well acquainted with the whole of the Scotch law ?—Yes, I may say so.

3338. Have you had considerable experience in the administration of the criminal law in Scotland ?—Yes.

3339. Have you turned your attention to the subject of Capital Punishment ?—I cannot say that I have. Perhaps I ought to explain that I only received the Secretary's note yesterday, and I came here without any preparation, and indeed without any knowledge as to what I might be asked about. The subject of Capital Punishment, I may say distinctly, is one to which I have not turned my attention.

3340. You have not turned your attention to the question as to whether it should be abolished in Scotland ?—I have not considered that subject specially at all, specially upon any occasion.

3341. (*Mr. Justice O'Hagan.*) You have not formed any opinion upon it ?—I should hardly like to say that I have. My impression is that the law as it stands, and which is administered in Scotland, works very well.

3342. (*Chairman.*) Do you mean the law generally, or the law with regard to capital offences ?—I mean the law with regard to capital offences as it is administered in Scotland, because the law as it exists makes a number of offences capital, which have never been punished capitally. By the law as administered in Scotland no crime is punishable with death except murder, nor has been in my time.

3343. (*Mr. Ewart.*) The practical effect of that, I suppose, is the same as in England ?—Yes, so far as I know the law of England, it is so.

3344. (*Mr. Waddington.*) Do you think that there would be any objection in Scotland to the law being assimilated to that in England,

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as well as the practice, by repealing Capital Punishment for those different offences?—No, I see no objection to it except this, and that might be provided for. Our law of bail is very simple, it is that all offences which are not capital are bailable, and that offences which are capital are not bailable. Any man who is committed for an offence which is not capital by the law of Scotland is entitled as matter of right to be admitted to bail, and the amount is fixed by the Statute. That law works very well at present, because our list of capital crimes is very large; but if you abolished the punishment of death with respect to these crimes, and made them not capital, you would require to regulate the law of bail differently from what it is at present.

3345. There would be no difficulty in doing that?—No, but it would require to be attended to.

3346. I believe that rape is still a capital offence in Scotland, but that the punishment has not been inflicted for a great many years?—It has not. The last occasion on which the sentence of death was passed for rape in Scotland, and which was carried into execution, was before I came to the Bar, and that is more than a quarter of a century ago.

3347. How is the law in Scotland with regard to passing sentence of death. I believe that the Judge cannot pass sentence of death unless the Lord Advocate or his representative calls upon him to do so?—Neither sentence of death nor any sentence. By our law the prosecutor must move for sentence before any sentence can be pronounced, and that applies to all cases.

3348. Therefore in Scotland that is left in the hands of the Public Prosecutor?—Yes, as it would be in the hands of a private prosecutor if there were a private prosecutor, for the law to that effect is older than our system of public prosecutions. The Public Prosecutor has no more power in that matter than private prosecutors had and would have still, but private prosecutions do not as a matter of practice exist.

3349. But the right of private prosecution exists in Scotland at this moment?—Yes. A public prosecution was originally exceptional in Scotland, it is now the rule, and has been the rule for 100 years. I suppose.

3350. It is quite universal, is it not?—Yes, so much so that since I have been at the bar there has not, I think I may say with certainty, been a single instance of a private prosecution in the superior courts, and I know of none in any inferior court either.

3351. I suppose that if there were ever a private prosecution the Lord Advocate would still have the power of entering what we call in England a *nolle prosequi*, he could still stop the prosecution, could he not?—No, I do not think that he could do that. I ought to explain, however, that it is a condition of private prosecution by our law (I am speaking of a matter which is interesting rather in speculation than in practice, as you will see from the fact of the real absence of private prosecutions with us,) that the prosecutor shall have the concurrence of the Lord Advocate; that concurrence never was refused; and there are judgments to the effect that he might be compelled to give his concurrence,—application would be made to him so that he might attend to the public interest in the matter,—but the public interest is, that the offence should be prosecuted, and there is no instance that I am aware of in Scotland in which the Lord Advocate has stopped a prosecution by private persons. He may always do it by prosecuting himself.

3352. He may always supersede a private prosecution?—Yes, by prosecuting himself.

3353. When there is an indictment for murder against a person in

Scotland, the Lord Advocate has always the power at the time of the trial of what we call going for the minor offence, going for a culpable homicide, and abandoning the capital charge ?—Yes, always.

3354. And is not that frequently acted upon ?—Yes ; and it is also in the power of the jury to return a verdict for the minor offence, whether the Lord Advocate insists upon the larger offence, or not. In any trial for murder the jury may if they please return a verdict of culpable homicide, which is our name for manslaughter, and they sometimes do it ; they have always the power to do it against the weight of the evidence and against the Judge's opinion of the law.

3355. In Scotland the verdict is returned by a bare majority of the jury ?—Yes, any majority will do.

3356. There is no difference in that respect, in capital cases and in other cases ?—None.

3357. Fifteen is the number of the jury ?—Yes.

3358. What is the legal effect of a verdict of "not proven" as distinguished from a verdict of "not guilty ?"—There is no difference between them as regards the legal effect.

3359. In the case of an indictment for murder, and a verdict of "not proven," the party can never be put upon his trial again ?—No ; a verdict of "not proven" is followed by the same judgment of the court as a verdict of "not guilty," a judgment of "absolvitur" assoiling the prisoner from the crime. Popularly, a verdict of "not proven" is thought to indicate some suspicion on the part of the jury that the prisoner committed the crime, although they cannot find him guilty.

3360. (*Mr. Justice O'Hagan.*) Is not it so understood, is it not to relieve the conscience of the jury ?—The juries understand that quite well themselves.

3361. (*Chairman*). The jury have the power of returning either verdict ?—Yes ; it is merely a customary verdict ; the true verdict is "guilty" or "not guilty," for "guilty" or "not guilty" is the issue ; and the most correct verdict where the prosecutor fails to establish guilt is to affirm the other alternative of the issue, namely, "not guilty," but the juries in Scotland from a very remote period have chosen to frame that other verdict of "not proven," which they return in such cases as you have mentioned.

3362. (*Mr. Waddington.*) Do you find in cases of murder that there is any difficulty in getting a jury to convict upon reasonable and fair evidence ?—No.

3363. You have not in your practice found juries acquit from a dislike to inflict the punishment of death ?—I have not in my own practice.

3364. Nor in your own observation ?—No, I cannot say so. Trials for murder are very rare in Scotland, and capital convictions are very rare in Scotland. I do not think that during the last 25 years there have been above four executions in Edinburgh.

3365. (*Mr. Justice O'Hagan.*) Two or three in a year appear to be the average in Scotland ?—I should think, of actual execution, not so much.

3366. (*Mr. Ewart.*) By a return I think you will find that for the last five years the convictions for murder have been 13, and that there have been but two executions in that time in all Scotland ?—I am speaking of Edinburgh. I think that I cannot be far wrong in saying that during the last 25 years there have not been more than four executions in Edinburgh, that is to say, four convictions for murder in the High Court of Justiciary upon which execution followed.

3367. Do you think that it is necessary to retain Capital Punish-

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ment where the executions have only been two in five years?—That is a matter upon which I as a lawyer am not peculiarly qualified to form an opinion.

3368. (*Mr. Bright.*) Have you come to state your opinion of the law, or to state an opinion upon the subject of Capital Punishment?—I did not volunteer to come. I received a note yesterday requesting me to attend.

3369. (*Mr. Justice O'Hagan.*) I see that there are 27 several crimes punishable by death in Scotland. Do you think that there would be any objection to make the law accord with the practice, and to confine Capital Punishment, if there be Capital Punishment, to murder alone?—I see no objection to it; and though I have said that the subject is not one to which I have turned my attention so that I can form any opinion upon it, nevertheless I have given it as my impression that the law as now administered in Scotland is not objectionable, the law as now administered being that murder only is punished capitally.

3370. (*Mr. Bright.*) There probably have been cases in Edinburgh within the last few years where the capital sentence has been carried out very much to the surprise and dissatisfaction of a large number of persons; is that not so? Do you not recollect such a case within the last five years?—I do not. I either was not aware of it at the time, or I have forgotten it.

3371. (*Mr. Waddington.*) Do you think, that the fact of the verdict being found by a majority is in favour of the accused person or against him?—Against him.

3372. It is very strongly against him, is it not?—I should think it against him, but I cannot say very strongly.

3373. (*Lord Stanley.*) He loses the chance which he would have under the system of unanimity, of there being some one or more jurymen who might take a perverse or obstinate view of the case?—Yes, he loses that chance certainly.

3374. (*Mr. Waddington.*) He will be convicted if there is only a majority of one against him?—Yes, he may be convicted of any crime whatever by a bare majority.

3375. He may be convicted therefore when there are seven who are firmly convinced of his innocence?—He may, but practically that is not so. I do not suppose that the jury was ever so divided; probably all think him guilty, but seven of them would say "not proven."

3376. (*Mr. Justice O'Hagan.*) Is the opinion in Scotland favourable to the existing system of the verdict being returned by a majority of the jury?—So far as I know there is no opinion against the existing system.

3377. (*Mr. Waddington.*) Do you think that they would object strongly to the introduction of the system of unanimity?—I think that all lawyers would. I do not think that the public generally have given the matter any attention.

3378. (*Mr. Bright.*) They accept it as a custom, and they do not complain?—Yes; and a custom which works sufficiently well.

3379. With regard to a man convicted of the crime of murder by a bare majority, does it affect the opinion or the decision of the Judge or of the Home Office with regard to the execution of the sentence?—It does not affect the Judge in pronouncing sentence, and so far as I know it would not affect him, if he had a clear opinion upon the matter, in the advice which he might give as to commutation. I dare say that if his opinion were doubtful, and were easily turned the one way or the other, it might weigh with the Judge favourably to the prisoner.

3380. Is the court or the public informed as to the majority and the minority in the decision of the jury ?—Not necessarily.

3381. A majority of eight to seven will convict ?—Yes, a majority of eight to seven will convict or acquit.

3382. When the verdict is returned is the state of the vote announced to the court ?—Merely that the verdict is by a majority.

3383. Then it may happen that neither the Judge nor the public is aware of the exact state of the vote of the jury ?—Where there is unanimity the jury generally, and indeed I may say invariably, announce it ; they say, "We unanimously find the prisoner guilty." Where there is a difference of opinion they invariably announce it as being by a majority, "We find the prisoner guilty ;" they sometimes state the majority, but I think rarely.

3384. In any applications by the friends of a convict to the Judge or to the Home Secretary is it usual to represent and to make it a ground for commutation that the jury were not unanimous ?—I cannot speak from any positive knowledge of particular cases, but it seems so likely that they should that I do not doubt that they do.

3385. Do the jury consider themselves bound after a verdict to conceal from the public the vote which has been given ?—No.

3386. Therefore it is always known ?—It is always known.

3387. Can you suppose that in Scotland a man might be convicted and hanged by the verdict of 15 jurors, seven of whom believed him not to be guilty ?—It might happen.

3388. Whereas in England the dissent of one juryman out of 12 would make it impossible for the man to be convicted ?—That is so ; but I do not believe that a case ever happened in Scotland of seven of the jury believing the prisoner to be innocent, and eight believing him to be guilty.

3389. Do you think that no case has happened where seven of the jury objected to give a verdict of guilty, and eight did give a verdict of guilty ?—Such cases have happened, I have no doubt.

3390. If the prisoner had been tried on this side of the Tweed he would have been acquitted ?—If that had been the state of the jury, if even one had refused to return a verdict of guilty, he would not have been acquitted ; but there would have been a miscarriage of the trial, it would have been no trial.

3391. But as far as regarded that jury and that trial he could not have been convicted ?—No.

3392. And it is quite possible that either the obstinacy or the superior judgment of one or two of the jury might induce the rest of the jury to acquit or to give a verdict of manslaughter ?—That is so.

3393. Then the chance of conviction in Scotland is much greater than in England ?—I should not say much greater, it is just greater to the extent of the difference between these two things. I do not know how it operates.

3394. (*Mr. Ewart.*) Do the jury recommend to mercy in Scotland ? —Yes ; the practice in Scotland is the same as in England in that respect.

3395. And I suppose that the proportion of the jury finding the guilt or the innocence of a man would be taken into account by the Home Office, would it not ?—I am scarcely competent to answer that question. I think it so likely, that I should say so, but that is from no positive knowledge upon the subject.

3396. (*Mr. Bright.*) In Scotland I believe you have no preliminary inquiry like our coroner's court ?—We have not that mode of preliminary inquiry, but in all cases of sudden death under circumstances

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which excite suspicion we have inquiry; it is inquiry generally by the sheriff of the county, with the assistance of the procurator fiscal, which we have found to be a very satisfactory mode of inquiry, so much so, that I am not aware that there is any idea that death from criminal causes passes unpunished in Scotland.

3397. Is the inquiry before the sheriff an open inquiry?—It is not.

3398. Would it be possible to get a return from Scotland of the number of cases of inquiry by the sheriff, which may be said to answer in some degree to our inquiry by the coroner's jury?—It is quite possible, indeed I think that such returns exist; all cases investigated by the Sheriff are returned to the Crown Office in Edinburgh, and I think that from these returns an annual statement is made up and transmitted to the Home Office.

3399. Is your system considered satisfactory by the people of Scotland?—So far as I know it is. I have heard of no complaints, and I am not aware of the existence of any ground for complaint.

3400. (*Chairman.*) You do not object to a closed court?—It has ever been the system in Scotland from a very ancient period, and I do not know that it has led to any evil results. Very frequently the inquiry which has been so made privately satisfies the authorities on the spot and satisfies everybody, for the result of the investigation is reported to the Lord Advocate or his deputes that there is no room for any suspicion of foul play, and the inquiry being made in that private way saves the feelings of surviving friends and relatives to an extent which is desirable, unless there is some public ground for another system.

3401. In the case of persons in the neighbourhood being interested in the result of the inquiry, either any friends or relations being in some way or other connected with it, would it be possible for them to know the result, or is it the practice to give them any information of the result?—Not of the evidence actually taken by the sheriff. The sheriff will see any such person and hear anything which he has to say, and will also see and examine any person whom he may suggest as proper for examination, but the evidence so taken by him is not communicated to any private parties whatever. The result, however, whether there are to be any criminal proceedings or not, is always known, and if any person is dissatisfied with it he may complain to the Lord Advocate or to the Home Office; such complaints are sometimes made, and are always attended to by an inquiry directed either by the Lord Advocate or by the Home Secretary.

3402. (*Mr. Bright.*) Have you ever observed that in the course of coroners' inquiries in England facts have come out which have changed the direction of the suspicions and researches of the police, and that criminals have in numberless cases been arrested in consequence of the attention drawn to the facts by the publicity of the inquiry?—I have; and that is undoubtedly a great advantage attending that system so far as that goes, and we undoubtedly have not that advantage.

3403. In cases of trial also have you not known that during the trial facts have come out which have tended to establish the guilt or the innocence of the prisoner in consequence of the publicity given to the evidence?—That is so also.

3404. There was the remarkable case of Courvoiseur. He was convicted entirely by information given in the course of the trial. Would it be agreeable to the people of Scotland to have the preliminary inquiry into crimes open as it is here in the case of coroner's juries?—I do not think that it would be disagreeable to the people of Scotland; indeed, so far as I know, I think that the people of Scotland

are pretty well satisfied with the thing as it is, but I do not think that they generally would object to any such change if they supposed that it would be attended with advantage. The only advantage, so far as I know, in the present system is saving the feelings of friends and relatives, where the result shows that there is no ground for any suspicion, and if the advantages of the other system overbalance that then the other system should be given to us, and I think that it would be received without any remonstrance.

3405. (*Mr. Ewart.*) Is there any inclination in favour of adopting the English system of a coroner's jury ?—I should say that there is not, and that we are satisfied with things as they are.

3406. Perhaps there would be an objection to making the procurator fiscal's court an open court ?—I think that you would have an objection to it by lawyers, and I think by Judges, both the superior Judges and the local Judges. I do not think that the laymen of Scotland would very much care how it was.

3407. (*Mr. Justice O'Hagan.*) In the event of a capital conviction is there any power in the Judge in Scotland to abstain from passing the sentence of death if he does not think that the sentence should be carried out ; is there any system of recording sentence, such as there used to be in England ?—None.

3408. In every case the sentence is pronounced ?—In every case of a capital conviction, upon the prosecutor moving for sentence, the Judge must pronounce sentence of death ; but the prosecutor may relieve him not only from the necessity of pronouncing any sentence, but from the necessity of pronouncing the capital sentence, by exercising his power of restricting the libel, as we call it,—that means that the pain or punishment of the law concluded for is restricted to an arbitrary punishment ; the prosecutor departs from the capital conclusion of his libel, and leaves it *in arbitrio Judicis* to pronounce any lesser sentence.

3409. (*Mr. Waddington.*) The Capital Punishment is a common law punishment in Scotland ?—Yes, for murder ; but even where the Capital Punishment is statutory the prosecutor has the power to restrict, and by exercising it the Judge has it not in his power to pronounce the capital sentence, and that is the way in which Capital Punishment is dispensed with in all those numerous cases which have been laid before you. In cases of robbery and rape, and burglary, which we call theft by house breaking, the sentences which the English courts have been used to pronounce are pronounced with us, although the crime is capital, by the prosecutor restricting the libel, and with our system of public prosecution that has been found to answer very well, because the prosecutor being a public officer may always be entrusted to restrict the libel except in those cases where it is not desirable to do so. Perhaps I ought to mention that the libel is usually restricted in those cases, (and I have seen it done even in cases of murder and infanticide), before the verdict of the jury is taken, so that the jury knows that the capital sentence will not be pronounced.

3410. It is restricted either before the verdict so that the jury may pronounce a verdict of culpable homicide, or afterwards ?—Yes ; it is not restricting it to culpable homicide. The crime for which the prisoner is convicted remains murder, but the Judge cannot pronounce the capital sentence for it. If the verdict returned is only culpable homicide no sentence of death can follow.

3411. That may be done by the jury or by the public prosecutor ?—Yes.

3412. After the Judge has passed the capital sentence upon the

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motion of the public prosecutor, has he the power to respite execution?—I do not think that the Judge has. There have been cases in which the High Court of Justiciary has respited the execution.

3413. I mean the Judge at the assizes?—The Judge at the assizes has never done it, so far as I am aware, and I am not in a position to say that he has the power; but the Court of Justiciary itself has in numerous instances respited the execution in order to admit of an inquiry, or a further communication with the Home Office.

3414. Whose duty is it to carry out the sentence of execution, supposing that nothing is done?—The sentence always specifies that.

3415. Does it rest with the sheriff to do it?—No, it is usually the magistrates of the county town; in Edinburgh it is the magistrate of Edinburgh, upon circuit it is the magistrates of the assize towns. The only cases in which the execution of the sentence is committed to the sheriff are where the sentence is appointed to be executed not in the town, but in some country district where the murder was committed. I think that I have known of only one such case since I came to the Bar, and that was about the year 1841 or 1842. I think it was a murder upon the Edinburgh and Glasgow Railway when it was in course of formation, and the sentence was ordered to be executed upon the spot where the murder was committed, and the execution there was entrusted to the sheriff, he being the only magistrate with jurisdiction.

3416. But in Edinburgh or Glasgow it would be with the provost and magistrates?—The magistrates of the town.

3417. Is the day fixed?—The day is always fixed in the sentence, and practically it is that day three weeks, which is the longest time allowed by the Act of Parliament. The sentence must be executed by the Statute in Scotland in not less than 14 days, and not more than 21 days, I think, after the sentence, and the day for execution is specified in the sentence; it is always the 21st day.

3418. After that it can only be respited by the Home Secretary?—Yes.

3419. (*Mr. Justice O'Hagan.*) Have you any new trial in criminal cases in Scotland?—No.

3420. Is there any Appellate Court?—There is no Appellate Court, There has been a practice of late years, not a common practice, but still one occasionally followed, that when any question of law arises upon the circuit, it is, as we express it, certified to the High Court, and the opinion of the Judges sitting in Banco is taken.

3421. (*Mr. Waddington.*) That is, as was the practice in England before our Court of Criminal Appeal was established?—Very much the same; it is the same in effect.

3422. (*Mr. Justice O'Hagan.*) That is matter of practice?—Yes, it is merely matter of practice; it is very rarely resorted to, but it has been resorted to in several instances in my own experience.

3423. And merely upon questions of law?—Merely upon questions of law.

3424. (*Mr. Waddington.*) Have you heard of complaints of the conduct of the spectators at executions in Scotland?—I have not.

3425. As far as you have understood, they conduct themselves decently?—So far as I know they do.

3426. Do you think that there would be any objection in Scotland to a change in the mode of execution to a private one, an execution within the walls of the prison; it is now public, I suppose?—It is now public; I should think that there would be an objection to such a change; there probably, as upon almost any such question, would be two parties, and which would be in the majority, I am not in a position to say.

The witness withdrew.

Colonel Henry Stace examined. *Col. H. Stace.*

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3427. (*Chairman.*) You were formerly in the Royal Artillery?—Yes.

3428. And since that you were Governor of Oxford gaol?—For nearly four years.

3429. At what date were you appointed?—In June 1859.

3430. When did you cease to be Governor?—In March 1863.

3431. During the period that you were Governor of Oxford gaol, or previously to that, have you turned your attention at all to the subject of Capital Punishment?—I have thought about it somewhat.

3432. More particularly after you were Governor of the gaol?—Quite so.

3433. You resigned that situation?—I did.

3434. What was the cause of your resignation?—It was partly from private reasons, and partly from my abhorrence of executions, more particularly, I should say, public executions.

3435. During the four years that you were Governor of Oxford gaol, was any capital sentence carried out?—There was one carried out immediately after I resigned.

3436. During the period that you were Governor of Oxford gaol, did you assist in carrying out any capital sentence?—I did not. I perhaps may state that I resigned more quickly than I should have done in order to avoid being present at a public execution. If I had remained Governor of the gaol my duty would have obliged me to be there.

3437. You have stated that you resigned the appointment of Governor of Oxford gaol partly from private reasons and partly from your abhorrence of public executions?—Quite so.

3438. And when you did resign, you resigned somewhat sooner than you would have done in order to avoid being present at an execution?—Precisely so.

3439. Am I to gather from you that had these private reasons not arisen, you would still have continued Governor of Oxford gaol, notwithstanding that you might have been called upon occasionally to assist at a public execution?—I think not. I think that my abhorrence of public executions would have over-ridden every other consideration; it might have done so.

3440. When you accepted the post of Governor of Oxford Gaol, did it not occur to you that in the course of your duty you might have to assist at Capital Punishment?—I do not think that it occurred to me sufficiently. Capital Punishments being so rare at that time it did not occur to me. A Capital Punishment had not taken place for many years in Oxford, and therefore I do not think that it came much into my mind at the time.

3441. Then if there had not existed any private reasons you still would not have gone on being Governor of Oxford gaol, from the fear that you might be called upon to carry out Capital Punishment?—I think not.

3442. Is that from a conclusion that Capital Punishment ought to be abolished, or from the abhorrence of having to be present and witness the scene?—I may state first of all that I think that Capital Punishment should be abolished for various reasons, and I may also be permitted to state that in my early days I saw an execution, though not in England, and I thought it such a horrid sight, and altogether it so distressed me, that I could not make up my mind to be present again at such a scene.

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3443. (*Lord Stanley.*) Was that an execution by hanging?—Yes; I have always had a great horror of public executions since that time.

3444. (*Chairman.*) Partly because you think that Capital Punishment is inexpedient, and that it ought not to be carried out, and partly from the dread of being a witness of it?—Quite so.

3445. Did you go from the Royal Artillery to this appointment?—No.

3446. Had you been holding any appointment between the time of your retiring from the Royal Artillery and your appointment as Governor of Oxford gaol?—I had charge of a reformatory in Westminster for about three years.

3447. A Government establishment?—No; it was a voluntary association, I was governor of it, and I had charge of it. It was called the London Reformatory; it has now been broken up; it was for adult male criminals.

3448. Will you state to the Commission any reasons why you think that Capital Punishment ought to be abolished?—I think that in the first place it is a very solemn thing to take away human life, and that it ought not to be done except in cases of dire necessity. I do not think that Scripture is altogether against it, but still as we live under a dispensation of mercy I think that that ought to be taken into consideration. I will, however, confine myself to the social considerations. I think that all punishments are to be looked at principally as regards their deterring influences, and I do not think that Capital Punishment deters people from murder sufficiently to justify its continuance. That is partly my reason.

3449. You do not think that it is sufficiently deterring?—I do not.

3450. What other reason have you?—Another reason is the uncertainty with which it is carried out, also the uncertainty of conviction. Of course it has been stated, and I have no doubt that it is the case, that juries have in some cases failed to convict in order to save a man's life.

3451. You probably think that Capital Punishment is objectionable in its nature, inasmuch as if you once hang a man you cannot bring him to life again?—Quite so.

3452. But if you transport him for his natural life, and if anything arises to cast a doubt upon the verdict he can be restored to his freedom?—Quite so.

3453. It is upon that ground that you think Capital Punishment objectionable?—It is partly upon that ground. I may also state that it struck me in reading some of the evidence which has been taken before the Commission that the persons who mostly seem to advocate the continuance of Capital Punishment are those in official position, and I think that there may be some reasons for that.

3454. (*Mr. Justice O'Hagan.*) What reasons?—Taking for instance officers of prisons and officers of police, no doubt they would think their lives less secure in the execution of their duties if Capital Punishment were done away with, and they probably think that it would be more difficult to carry out other sentences and discipline in prison.

3455. (*Lord Stanley.*) Then you think that there is a certain deterring effect connected with the punishment by execution, which does not apply to the same extent to any other punishment?—There may be, or there is supposed to be at any rate. You cannot prove it so well.

3456. (*Mr. Bright.*) What was the salary of your office as the Governor of Oxford gaol?—300*l.* a year with a house and allowances.

3457. What was it worth altogether ?—I should think that it was worth quite 400*l.* a year.

3458. How long had you held it when you resigned ?—Nearly four years.

3459. Was the execution to which you have referred the first which had taken place since your appointment ?—It was.

3460. How long was it before the day fixed for the execution that you resigned ?—Not more than a week I think. I resigned shortly after the trial ; there was an interval, I think, of about three weeks between the trial and the execution.

3461. (*Mr. Waddington.*) You say that one of the objections which you have to Capital Punishment is that it is not sufficiently deterring, have you any other punishment to substitute which you think would be more deterring ?—No, I have not ; that is an extremely difficult question.

3462. Do you think that any punishment would be equally deterring ?—I think that it is a very difficult question ; I think that the only alternative would be perpetual imprisonment rigidly carried out ; I see no other.

3463. (*Chairman.*) From your experience as Governor of Oxford gaol, do you not see great difficulty in putting together a number of criminals sentenced for life, without hope of a remission of their sentence ?—I think that there would be great difficulty in managing them ; I think that you would have to increase your staff.

3464. (*Mr. Justice O'Hagan.*) But you think that it could be done ?—I think that it could be done. I had some very troublesome prisoners to deal with during the short time that I was there.

3465. (*Chairman*). But none of the prisoners whom you had to deal with were sentenced for life without hope of remission ?—None.

3466. Would not that make a very great difference ?—I think that it would make some difference certainly ; they were probably less reckless.

3467. We have had evidence before us that it is thought inexpedient to put what may be called life men altogether in Portland, and that they are distributed as much as possible among short sentenced men ?—I think that it would be highly inexpedient to do so.

3468. But in the prison which has been pointed out, you would have all these men together ?—I would not have it arranged in that way certainly ; I would scatter them about ; I think that otherwise it would be extremely dangerous.

3469. Then you would not be in favour of a scheme which suggests that one prison should be set apart for all persons who were sentenced for life, who had been guilty of murder ?—I should certainly not.

3470. Do you think that it would be possible to carry out that sentence in that way ?—It would be possible no doubt, but it would be extremely difficult, and would require a very large staff, and very strict discipline. I have no doubt that it would be possible.

3471. (*Mr. Justice O'Hagan.*) Would you prefer to mix up the life men with persons sentenced to minor punishments ?—Of course the great consideration would be the difficulty of carrying it out. If you put a number of these men together you must of necessity, I think, increase your prison staff very considerably, and you must increase your means of punishment.

3472. (*Mr. Waddington.*) I suppose you do not contemplate keeping them in separate confinement for life ?—Certainly not, it would drive them all mad.

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3473. And if they were to be associated, you think that it would be difficult to keep them under control ?—Yes.

3474. (*Mr. Bright.*) How do you know that keeping them in separate confinement would drive them all mad ?—Because I think that no man could stand it after a certain amount of solitary confinement. With the experience which I have, I think that it would be almost impossible.

3475. (*Mr. O'Hagan*) Solitary confinement and separate confinement are different things ?—Separate confinement, carried out as it is at present, is almost solitary confinement.

3476. (*Lord Stanley.*) You mean that a man would be liable to go mad if he were made to work and for the most part to live within his cell, although he might be visited from time to time by prison officers, and so not be confined to absolute solitude ?—If what I call the separate system were rigidly carried out, I think that it might have that effect.

3477. Is not about a year the utmost time to which prisoners are now subjected to separate confinement ?—About a year or 18 months ; two years, I think, is the longest period.

3478. (*Mr. Waddington.*) The longest period is two years, with hard labour, in a prison on the separate system. You would still let your prisoner take exercise ?—Yes.

3479. And he would have frequent visits from the chaplain ?—Yes.

3480. And from the medical man, and if he had occasion he would see the prison officers ?—Yes.

3481. And that would be all ?—Yes.

3482. (*Mr. Ewart.*) Does not separate confinement produce a different effect upon different individuals ?—A very different effect ; I think that that is a system which requires to be very much watched. I had an instance of a soldier who was in confinement in Oxford gaol, who was obliged to be released after a few months ; he certainly would have gone mad if he had been kept under his sentence, but he was a man of a very nervous temperament, and a sensitive man. I think that a great deal depends upon the temperament of men.

3483. (*Mr. Waddington.*) In such a case where a man's reason is supposed to be affected by confinement, do not the medical authorities make a representation to the Home Office ?—Yes ; the case which I have mentioned was attended to immediately.

3484. (*Chairman.*) In the case of a murderer who was under sentence of imprisonment for life, you could not let him loose upon the public on such a ground as that ?—No, it would be impossible.

The witness withdrew.

Adjourned to to-morrow at 12 o'clock.

Saturday, 25th March 1865.

PRESENT :

THE DUKE OF RICHMOND.
LORD STANLEY, M.P.
MR. JUSTICE O'HAGAN.
HORATIO WADDINGTON, ESQ.
WILLIAM EWART, ESQ., M.P.
CHARLES NEATE, ESQ., M.P.

HIS GRACE THE DUKE OF RICHMOND IN THE CHAIR.

The Rev. WILLIAM COOK OSBORN examined.

The Rev. W. C. Osborn.

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3485. (*Chairman.*) You are chaplain of Bath gaol ?—I am.

3486. How long have you been so ?—Twenty-two years.

3487. During that time have you given the subject of Capital Punishment much consideration ?—Considerable ; and having only a small number of prisoners under my care, I have been able to study each case.

3488. What is the average number annually ?—Sixty ; the first year they were 100, and now they are about 80.

3489. During the 22 years that you have been chaplain of Bath gaol, how many executions have there been ?—None. That is a borough gaol, and the prisoners are only confined with us prior to trial, or brought to us after their sentence, when that sentence is commuted to imprisonment.

3490. Is that a capital sentence ?—In some cases it may be considered a capital sentence, where the capital sentence is not carried out for certain reasons.

3491. Are they those who have been tried at sessions and assizes ?—They are sent to us after they are tried at the assizes, where capital cases go, and they serve their time with us for two years prior to transportation.

3492. (*Mr. Neate.*) No prisoners who are sentenced to death are ever sent back to you ?—No.

3493. You have under custody, awaiting their trial, prisoners who have committed capital crimes, but when they are sentenced they are not sent back to you ?—If they are sentenced to be executed they are not sent to us, they are kept at the county gaol, and the sentence is carried out there. Prisoners who have been found guilty of murder, but their sentences commuted, and prisoners tried for murder, but found guilty of manslaughter or concealment of birth, are frequently confined in the Bath goal ; for instance, a woman, who was convicted of murdering her husband, but the sentence of death was not executed, was sent back to our gaol to stay there for two years before being transported, and so in one or two other cases.

3494. (*Chairman.*) Both of men and of women ?—Both of men and of women. If there is any term of imprisonment given in the Judge's sentence, they undergo it in our gaol.

3495. That is for offences committed within the precincts of the borough ?—Yes.

3496. And of course for none other ?—For none other. We have had prisoners in our gaol from the Government, Government convicts, for very serious offences, such as burglary and highway robbery, and men under sentence of 10 years transportation have been brought under my notice in that way.

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3497. Would you be in favour of the abolition or the retention of Capital Punishment?—Perhaps I may be permitted to state my objections to Capital Punishment. First, I conceive that the gift, the maintenance, and the taking away of life appertain only to God. Secondly, we being fallible creatures, should so punish as to have the power of reparation. Thirdly, Capital Punishment does the very thing which it proposes to restrain. Fourthly, it hardens and brutalizes the hearts of the beholders of executions, and the readers of their details. Fifthly, it suggests to all persons, especially to morbid, passionate, and insane persons, murders and suicides, and a ready means of committing them. Here I would mention a case which has occurred during the last two months. A man was sent to our gaol for four months imprisonment for assaulting his wife, he arrived at 5 o'clock in the afternoon, the warder gave him his supper between 6 and 7, and I think went and took away his clothes from him about 8, or between 7 and 8, and within a quarter of an hour after that he committed suicide, and was cut down a corpse. I argue from that that man had no fear of death, and that the fact of his using a rope was suggested by the present mode of Capital Punishment. I remember seeing an execution, when I was a boy, the only one that I ever witnessed, and I well remember the circumstances of a saddler hanging himself a few days afterwards, and I have noticed in the public papers ever since, a wonderful connexion apparently between executions and the ordinary mode of suicide. It is the usual way in which suicide is attempted in gaols. Sixthly, I object to Capital Punishment because it limits the time for preparation for death, and thus tampers with, if not trifles with the everlasting state of man; it may launch souls into an eternal world, and consign them to a punishment compared with which cruelty and torture on earth are as nothing. Seventhly, I object to it because men, "children of wrath, even as others," fellow-sinners with those who are condemned, are the agents in carrying it out, and may themselves be murderers in the light of the gospel. Eighthly, I object to it, because it tends to destroy the sacredness of human life, and in that way Capital Punishment may be charged with a great portion of the bloodshedding which has occurred during the past 1,800 years. My ninth objection to the death penalty arises from a careful observation in my official position which has produced the conviction on my mind, that it is possible and probable that persons may be hung who, if the extenuating circumstances of their lives and offences were known, would have their sentences commuted to imprisonment for life, if not even for a limited period. 10th. The law gives power to abandoned persons, to priestly bigots, to tyrants in authority, to compass the death of the innocent and the good. 11th. The feelings of good and humane men would recoil from participating in the actual execution of the law, and in the best moments of their lives they disapprove of the gallows; certainly they shudder at even the thought of an immortal soul being hurried into eternity in the way that he is. 12th. I disapprove of Capital Punishment, because the execution of the law is very partial; for I do not believe that if exertions were made for any murderer of the kind which were made for Dr. Dodd, the law would now be executed. 13th. Because the exercise of mercy is never opposed by counter petitions; indeed, it always seems to please the public, and if there is a choice of errors, it is said, "Let "us err upon the safe side." Again, 14th. I feel assured that if a young and beautiful girl, of previous good and benevolent life, were to be convicted of the crime of murder ever so atrocious, she would escape the death penalty; and I think that when such is the condition of the public mind, it is high time that the death penalty should cease.

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15th. Because if local interest can be aroused, and the influence of members of Parliament can be obtained, the life of any murderer may be saved; but if the individual happens to be in an obscure place or village, without means or friends to advocate his cause, he is certain to be hung. Again, 16th. If insanity comes upon a prisoner, or a prisoner can successfully feign it, he is certain to escape. 17th. Remissions of sentence have been so many, and executions so few, compared with the number of murders committed, that if Capital Punishment ever did deter, I conceive that it cannot do so now. 18th. Because it has failed to deter from the commission of crimes against property, and I see no reason for its being effectual in preventing murder; for death is of all things least reflected on, and men live and act as if "all "men were mortal but themselves." The probability of death does not deter, as we have evidence from war and the dangers to which persons will expose themselves for trifling considerations. I conceive that perpetual imprisonment would be more effectual. There are one or two cases to which I would make a special allusion. The woman Charlotte Harris, already referred to, was convicted of poisoning her husband; and she would have been hung, but a jury of women found her in a state of pregnancy; she was sent back to our gaol, and there stayed for two years. I spent a great deal of time with her, but I never could get any admission from her which at all condemned her, or convicted her out of her own mouth. I could not get any confession of guilt. I tried during those two years for some time every day; if I found her ill, I said, "You "will not get better until you have made an acknowledgment of your "offence;" still throughout the whole two years she maintained a state of quiet persevering assertion that she was an innocent woman. On the last night which she spent in our gaol I took down in the evening the newspaper evidence, and read it over to her, and she carefully, throughout the whole time that I was reading it, listened to me, and said, "Yes, sir, that is right," and "that is right," but "that is not "right." I argued with her, and I told her that if I had been on the jury I must have found her guilty. Still she went away from my care with such a declaration of her innocence, that I feel an uncertainty about her case, though the evidence convicted her.

3498. (*Mr. Justice O'Hagan.*) How does that case bear on the question of Capital Punishment?—I ought to have brought it under the head of the character of the individuals who are guilty of murder, and who are sentenced to be hung, as I wish to speak to the Commission upon their general character. The woman had a good character previous to this offence.

3499. (*Mr. Neate.*) You mean that she might have been an innocent person, you having failed to obtain a confession from her?—Yes.

3500. (*Mr. Ewart.*) Your mind was shaken as to her guilt?—Yes. For two years, in sickness and in health, I assumed the guilt of the woman, and she would say to me. "Ah, sir, you think that I am guilty, "but it was not that which would have hung me, it was my marrying "again so soon."

3501. What general inference do you draw from all this?—The first inference is that it leads me to doubt her guilt, although I always assumed it in her presence.

3502. (*Chairman.*) When she left Bath gaol, having been incarcerated there for two years, what happened to her?—She was transported, and I believe that she was sent abroad. She was removed in the first place to Millbank, and then, I believe, sent abroad, and I lost sight of her.

3503. So far as her interest in a worldly point of view went, she

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could gain nothing by confessing to you that she was guilty?—No; nor could she gain anything by steadily adhering to her statement that she was innocent.

3504. It is possible that she might have hoped to get a remission of her sentence?—She might, but it went on for two years.

3505. (*Lord Stanley.*) Is it not your general experience that great criminals, though they will very often admit what the general tenor of their lives has been, almost invariably deny the offence with which they have been charged?—I think that persons who are sentenced under the capital law are not great criminals; they belong almost to every class of society. I have 50 cases, and I can furnish the Commission with all the details.

3506. (*Chairman.*) As to what point?—Showing the classes to which persons belong who are liable to be tried for murder. I would beg to notice one particular case. A young woman was tried for the murder of her child, at the Taunton assizes in 1850; she was sentenced to 12 months imprisonment, but the peculiar circumstances of her case did not transpire until some month or six weeks after her imprisonment commenced, and therefore I argue that, if she had been hung, we should never have known all the circumstances of her case; and the circumstances of her case were these: She was seduced by the son of her master, in a little village in Wiltshire; she came to Bath to be confined; she tried to get relief from the poor law authorities, but failed; she tried to get home, but stopped on the road side, and was obliged to return, and when she was confined she had no provision either for herself or for her child, and she committed the offence which was very near being the cause of her execution. Those circumstances did not come to my knowledge until a month after her trial, and therefore she might have been hung without our ever knowing those circumstances which I now mention. There are other particular cases which have come recently under my notice. I would mention those of two men, who were respectable in their stations of life, but in a fit of jealousy or exasperation shot at their wives with the intent to murder them, and had not the women been sent to the hospital, and the good providence of God restored them, one or both the men might have been hung. In order to judge of the persons who are sentenced to execution, I think that we are at liberty to take into account the classes to which those persons belong who just escape execution, because they are in the same category. The point to which I am anxious to bring the Commission is, that these great crimes are not committed generally by men of abandoned character.

3507. That is admitted on all sides. It is your opinion that the men who commit murder do not, as a general rule, belong to the criminal class of the country?—It is, as a rule; very few come from that class, not a tithe upon whom the punishment of death has a deterring influence, or has any effect, assuming that it has an effect upon any person.

3508. (*Lord Stanley*) You have spoken of the punishment of death not having a deterring effect because men do not look forward to death, and are willing to throw away their lives on very trifling occasions; but do you think that that applies to the case of an ignominious death, publicly inflicted in a manner bringing, or supposed to bring, the greatest disgrace upon the individual himself, and upon his family?—I think that it does; I think that the punishment has no effect upon the individuals on whom we would desire that it should have an effect.

3509. I presume that you do not deny that when a prisoner is actually under sentence he looks forward with greater apprehension and with

greater horror, to the prospect of being executed, than to that of undergoing any other punishment which could be inflicted upon him? —When his mind is compelled to consider the subject, and is kept close to that one idea, then the mind is naturally led to think of it and the consequences; but until that is the case the prisoner, and everybody else, seem to neglect the thought of death; and those very men who are sentenced to die, and dread execution, I believe, would be among the first to risk their lives in the protection of their fellow-creatures from fire, or in war, and I believe they would be the first to volunteer to become "forlorn hopes," or any thing of the sort.

3510. Whom do you speak of?—These very men who are capitally convicted; I say that they have no fear of death; that they do not look to the consequences.

3511. Can you generalize them in that way as to all of the very various classes of persons by whom murders are committed. Is there anything in common, for instance, between a man who deliberately and with premeditation poisons another in order to succeed to a fortune, and a man like the collier who was executed the other day for murdering his wife in a fit of passion?—Yes, the temptation of arriving at the end which they have in view is greater than the fear of death.

3512. Then, as I understand your argument, it is this: that inasmuch as the prospect of punishment is not considered when the offence is committed, no punishment which can be inflicted is really deterrent in such cases?—I think that perpetual imprisonment would be more deterrent to them, because they can understand that better than they can understand what is meant by death.

3513. Do you think that men of that class, who are too brutal and too stupid to realize to themselves the prospect of a violent death, will better understand and be more able to look forward to the prospect of imprisonment for life?—I do. I call to mind at this moment one or two men who I should say belong to the very class of which you speak; you may look upon them as fatalists—they have no fear of death. I refer to the few great criminals who commit capital crimes.

The witness withdrew.

Sir Walter F. Crofton, C.B., examined.

3514. (*Chairman.*) You have been a Director of Convict Prisons in Ireland?—I was Chairman of the Directors of Convict Prisons in Ireland.

3515. How long did you hold that post?—From 1854 to 1862.

3516. I think you resigned in 1862 on account of your health giving way?—I did.

3517. During that period and previously I believe you have given the subject of prison discipline great consideration?—I have.

3518. Was the board of which you were chairman the originator of a new system of secondary punishments in Ireland? Was a new system of secondary punishments commenced in Ireland while you were chairman of that board?—It was new in some particulars.

3519. During the period that you have been mixed up with prison discipline, have you formed any opinion, first of all as to whether Capital Punishment ought or ought not to be retained?—I have thought of the subject of Capital Punishment for many years. My opinion is that the due consideration of the subject entirely depends upon our having in our secondary punishments an effective substitute provided.

3520. Supposing that it could be shown that a proper system of

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secondary punishment could be carried out, would you then be in favour of the abolition of Capital Punishment?—It would be a speculative opinion on my part to say so. I should require satisfactory proof with regard to the substitute before I could advocate the abolition of Capital Punishment. I do not believe that penal servitude for life, if carried out in the existing convict establishments of either England or Ireland, would by any means prove an effective substitute.

3521. (*Lord Stanley.*) Will you explain that answer?—If penal servitude for life were carried out in our convict establishments, either in England or in Ireland, as at the present time, it would not in my opinion prove an effective substitute for the punishment of death. I contemplate that it would require special prisons and a special discipline for life sentences in order to obtain an effective substitute for Capital Punishment.

3522. (*Chairman.*) Would you think it possible, in the event of Capital Punishment being abolished, to confine prisoners who might be under a sentence of imprisonment for life, in any of the same prisons with other convicts who were subjected to a less sentence?—I do not believe that it would be desirable or practicable.

3523. Do you think that it would be practicable to carry out the life sentence which would be the substitution for Capital Punishment, in prisons to be built for that purpose?—I do.

3524. You think that it would be possible to establish such a system of discipline, as to manage prisoners confined for life without hope of remission, in a prison which would be simply a prison for murderers?—Yes, I consider that in a special prison, provided by the Government, it would be practicable; but that it would not be so if those prisoners were mixed up with other prisoners in a convict establishment. The convict system in this country and in Ireland was devised without any regard whatever to the possibility of keeping men for their lives or for any very long period in confinement; in England, particularly, they were always sent to the colonies after certain periods of detention, and I do not believe that at this moment you have men who have been 10 years under detention in the convict establishments of this country. In Ireland we have had them for periods ranging from 10 to 15 years under our notice. I have known men, and have particularly observed them, who have been 14 and 15 years under imprisonment. I obtained within the last few days from Captain Whitty, who is now at the head of the convict establishment in Ireland, a return of the number of men who are at present under detention in the Irish convict prisons, and have been so for a period exceeding 10 years. I have done so with the idea of showing that men may be detained for certain periods of time, without detriment to their health, even in an establishment which is not suited for their being kept for life.

3525. (*Mr. Waddington.*) What is the longest period which you have known?—There is a man now in one of the convict prisons who has been there 15 years and 8 months. I have known men to have been in prison 15 years, and I have had many varying from 10 to 15 years. I thought that the best plan would be to send to Captain Whitty, and get from him a return of the number of men and women in the prisons who have been confined between 10 and 15 years. I did so because I know that in this country they have not been in the habit of keeping men for 15 years, but have sent them to the colonies.

3526. Excepting those few who are unfit for transportation?—Yes. There are now in the Irish convict prisons 70 male convicts under life sentences, and 9 female convicts; exceeding 10 years under detention, there are 28 males and 7 females; exceeding 12 years there are 18

males and 1 female; exceeding 13 years there are 13 males and 1 female; exceeding 14 years there are 3 males and 1 female; exceeding 15 years there are 2 males. There is one man, I understand, who has been 15 years and 8 months.

3527. (*Chairman.*) With regard to these men and women whom you have now detailed to us, what is the condition of imprisonment which they are undergoing?—The men are chiefly on the public works.

3528. (*Mr. Waddington.*) At Spike island?—Yes; there are some tradesmen who are employed in the associated wards in the separate prison. This very man, who has been 15 years and 8 months in prison, is now on the public works at Spike island, and the majority would be there.

3529. (*Chairman.*) They are all in association?—They are all employed in association in the day.

3530. Of course they have separate cells at night?—Not all.

3531. (*Mr. Waddington.*) Are they allowed to converse, or do they only converse by stealth if they can do so; is it contrary to the rules that they should converse?—There are exactly the same rules for them as for any other prisoners, they are not allowed to converse more than others. After 10 years detention, if well conducted, they are moved into a separate building in Spike island, and kept by themselves.

3532. (*Mr. Neate.*) Is there any mitigation then in the rules?—They have lectures more frequently than the others.

3533. Are they allowed to converse?—Yes; and when they are off work this class sleep in association.

3534. (*Mr. Waddington.*) That is more resembling an intermediate imprisonment?—Yes, in that particular.

3535. (*Chairman.*) Have you any experience in Ireland of the longest time that prisoners have been kept in separate confinement without association?—Yes; I have known them kept for 16 months without association.

3536. Would you think it possible to keep them longer?—I should think it possible; but I do not know that any advantage would be obtained by it.

3537. If it was desired to increase the punishment it would be possible to keep them longer without association?—Certainly.

3538. If that was considered an advantage?—If it was considered an advantage, I have seen no reason during the 16 months to believe they could not be kept longer.

3539. (*Lord Stanley.*) You think that there is no fear of their mental faculties being affected?—Not generally; I have seen such a case, but there has been a predisposition, and the prisoner has been removed.

3540. (*Chairman.*) Are you speaking now of such a system as is carried out in Pentonville?—Yes.

3541. (*Mr. Waddington.*) A separate confinement preparatory to being employed on public works?—Yes.

3542. During that separate confinement they have the hope and indeed the certainty of being shortly employed in association upon public works?—Certainly.

3543. (*Chairman.*) Is it necessary that they should always remain in separate confinement for the same period, or in the case of good conduct or industry is the time lessened?—It is now laid down by general rule that they should all have nine months separate confinement, which applies to life convicts as well as others. If a man misconducted himself in the separate prison, he would be kept longer;

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if he misconducted himself subsequently upon the public works, he would be brought back and have renewed separate imprisonment.

3544. What is the intermediate imprisonment which you have spoken of?—It has nothing to do with life sentences, it applies to ordinary convicts; life sentenced men have never come into the intermediate prisons; all that could be done with them has been to remove them to a separate building in the ordinary prisons.

3545. In the case of life sentences, at the expiration of how many years would the men be liberated, or would they be kept to work out the whole sentence?—It would just depend upon the circumstances of their particular case. No promise of being released is held out to them. There are some cases where the prisoners have been let out at the end of 12 years. We have kept one man, as I have said, 15 years and 8 months, and it is very likely he may be kept another year or two years.

3546. (*Mr. Waddington.*) It is entirely dependent upon the discretion of the Lord Lieutenant in Ireland?—Yes; each case is considered, and referred to the Judge.

3547. It is carefully understood that they shall not be entitled to liberation at any particular time?—Yes; but I agree with the evidence which Colonel Henderson has given, that notwithstanding that, they all feel that there is a time when they may look forward to release.

3548. (*Chairman.*) In fact they are never without hope?—They are never without hope as long as they are in the ordinary prisons; but I object altogether to their being kept in the ordinary prisons. I by no means consider that that is the proper place for them.

3549. What do you suggest is the proper place?—I should keep them in prisons by themselves.

3550. What class of prisoners are you speaking of?—Prisoners with ordinary life sentences.

3551. You are not alluding to sentences passed, supposing that the penalty of death was abolished?—No; excepting that in the prison where I would have men detained for their lives, I should have a special portion of it allocated for men who had had their death sentences commuted, I should increase the severity with regard to them, and would take care that it should be known that as far as possible they were dead to the outer world. I would make a distinction between them and the ordinary life sentence prisoners.

3552. (*Mr. Ewart.*) You would have a special prison for persons who are now capitally punishable, and who supposing Capital Punishment was abolished, would be subjected to some other punishment. What are the special characteristics of the prison which you would suggest?—I am not now in a position to lay down any particular detail; but in Belgium they are in the habit of keeping at least 300 to 400 prisoners who are sentenced for life, they keep them 20 and 25 years, and in some cases for life; they retain the punishment of death, but they very generally and nearly always commute that sentence to a life sentence, there is now, I understand, an accumulation of upwards of 400 life sentenced men in the prison of Ghent.

3553. (*Mr. Waddington.*) There were some years in which there was no execution in Belgium?—Yes. In Tuscany they still retain the punishment of death, but for the last 26 years they have not used it. I have never inspected the prison at Ghent, in Belgium, but I have seen people who have inspected it thoroughly, and they tell me that these men are kept in very good order, and that there is no reason whatever why they should not be detained for their lives. My suggestion would be that a thoroughly minute examination should be made of

some of these cases in Continental prisons where they have been kept for very long periods of time, because in this country we have but little evidence to go upon; the longest period that we have is in the case of the man who has been detained 15 years and 8 months in prison. I would suggest that a system based on this examination should then be framed for specially treating life sentences. It is imperative upon us to do so as far as the present life sentences are concerned, because we are not to send prisoners any longer to Western Australia, and it is ordered that in many cases they may have to be kept for their lives. We have already informed the convicts, by desire of the Penal Servitude Commission, that they are not to claim any particular period for discharge, and that in many cases it may be necessary to detain them for their lives. Therefore it is really incumbent upon us that we should have some system which would enable us to do this satisfactorily. Colonel Henderson tells you that it cannot be done in the convict prisons in England. I quite agree with him, because the convict system was never devised to deal with such cases.

3554. The convict system in England, as established by Sir Joshua Jebb, was meant for an intermediate system?—It never contemplated keeping these men for life. Practically, if you have this class mixed up with others, they will be so accustomed to see stimulants to good conduct given in the way of tickets-of-leave, and other inducements, that they, not having anything of the sort, would be likely to be very troublesome; whereas if they were in a special prison by themselves, where they would not be surrounded by those kind of stimulants, they would be content with any slight improvement in position; you can preserve hope amongst prisoners by taking them from very hard and distasteful labour, and placing them gradually to industrial employment. Lord Carnarvon, since the House of Lords Committee recommended that plan, has illustrated it at Winchester. It was said "You can never stimulate the prisoners because you have no incentive to exertion;" but it is now considered to be a great advantage for a man to get from penal labour to industrial labour; and it would be as much to a man under life sentence in a special prison as granting a ticket-of-leave to a convict in one of the convict prisons. At Winchester gaol they will tell you that the prisoners perform a great deal of work, and that they think it a very great privilege to get into industrial employment from hard manual labour. Prisoners think that the smallest matter is worth possession, and worth struggling for.

3555. (*Lord Stanley.*) In the total exclusion of more important interests from their minds, these trifles acquire a great importance to them?—Quite so. With regard to refractory prisoners, I have had to do with men who have been extremely refractory. Two men were under sentence of death; neither of them appeared deterred by it. But I should be very sorry to argue from that circumstance that the fear of death is not deterrent; their sentences were commuted. We had to remove them and others who were under life sentences and refractory to a special prison, which we had for the purpose, and treated them in the first instance more like lunatics, with padded cells and double guards, and placed them under stringent rules. We kept them a twelvemonth in that state. More violent men than we had under those rules it is impossible to find, but we had no instance of injury to an officer. I am quite certain that by continuous and severe discipline those men were subdued, for after a twelvemonth we were enabled to bring them back again to the ordinary work. I believe that arrangements could be made with regard to such men so as to prevent the lives of the officers being in jeopardy.

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Very stringent and special orders were issued with regard to these men; they were exercised and at work singly; two officers attended each prisoner, so as to put out of their minds the idea that they could effect violence. They were kept for a twelvemonth, and nothing serious occurred. Therefore, in a special prison, even with life sentenced men, I should not be at all frightened at the idea that they would be refractory, because I am quite sure that with a continuous and severe discipline, without cruelty, they would find it to their interest to work in a proper way. Chains were of course resorted to, and we know that in other countries chains are very generally used.

3556. (*Mr. Waddington.*) In the French prisons the prisoners have to work in chains?—Yes; and at Munich and other places they work with heavy chains, and then with light ones, and so on from stage to stage.

3557. (*Mr. Neate.*) Then you do not apprehend any insuperable difficulty in managing convicts under sentence from the abolition of Capital Punishment?—I do not, certainly.

3558. You might have to take greater precautions?—I should have to take greater precautions.

3559. But still you think that the difficulty can be overcome?—I am certain of it.

3560. And you do not apprehend the difficulty of keeping convicts to be a serious objection to the abolition of Capital Punishment, supposing that on other grounds it was thought desirable?—I should apprehend no difficulty whatever with regard to the custody of convicts by making proper arrangements. But I should wish to observe, as I have been looking at the reports with regard to Belgium and Tuscany, that they have not abolished the punishment of death; that they have retained the punishment of death apparently until they find their mode of disposing of life sentences prove satisfactory, when they will probably ultimately abolish it.

3561. (*Chairman.*) Am I to gather from you that you would desire to see Capital Punishment abolished, supposing that prisons were built and discipline established such as you have suggested, for the purpose of keeping prisoners who would otherwise be executed?—I cannot go so far as that. I would go as far as this: I would not abolish the punishment of death. I would allow the punishment of death to be retained; but I should apprehend that after a system such as I have described for treating life sentences has been tried, and is generally felt, as I believe it will be felt, by the public, to be an effective substitute for death punishments, commutations might be made without detriment, and death punishment ultimately be not needed. I should take as an example other countries which have practically done away with death punishment, still, however, retaining the power.

3562. Would there not be some difficulty in retaining the punishment of death, and not carrying it out? In case of a bad murder, am I to understand you to say that you would retain the power of executing the man, though you would not carry out the sentence?—Yes; but I would not carry out the sentence if I found that the mode of treating life sentences had, by experience, proved an effective substitute.

3563. Therefore you would advocate retaining the power of executing such a man as that for some years, until it was found whether Capital Punishment could be safely abolished from the statute book?—That would be my view.

3564. And if during that time without having any executions it was found practicable to keep these men who were sentenced for murder in the manner that you have described, you would then have the punishment

of death abolished?—Yes, that is my view, and I base it upon what I have found is done in other countries.

3565. Then practically you would abolish Capital Punishment, substituting for it these prisons, and such discipline as you have stated?—Yes, if they were found to answer; it must be speculative at present.

3566. (*Mr. Justice O'Hagan.*) Assuming that there was an efficient system of secondary punishment under which life sentences might be effectually carried out, you would say that the death punishment should not be inflicted?—Yes.

3567. And I understand you further to say, that according to your experience, having had experience of these long sentences and these long imprisonments, your opinion is (speculatively of course) that it might be effectually carried out to the full extent of life imprisonment?—That is my opinion.

3568. And your further opinion I understand to be, that for the purpose of managing the prisoners the element of hope may be maintained within the prison although they may be dead *quoad* the world, and continued in the prison all their lives?—That is my opinion.

3569. (*Lord Stanley.*) When you say detained in prison all their lives, you do not mean absolutely I suppose within the four walls of a prison, but in some place of detention?—In some place of detention in connexion with that prison.

3570. (*Mr. Ewart.*) You would never destroy hope in a modified sense?—Never.

3571. (*Mr. Justice O'Hagan.*) For the purpose of punishment, such as might be substituted for death punishment, I take it that you would not have those prisoners ever allowed to leave this prison or to return to the world in any way?—Certainly not; and that is why I say that it must be proved by its practical results, and that the general opinion of the public must be ascertained between death and the substituted punishment before you could safely abolish Capital Punishment.

3572. (*Mr. Waddington.*) If you still retained the punishment of death though you seldom inflicted it, you would have a hold upon a man who committed a second murder, so that he should not go without punishment for it?—Yes.

3573. That might be very desirable for some years?—Yes. I believe also that we require some change with regard to our present life sentenced prisoners. Our practice must be changed from what has been hitherto pursued.

3574. (*Mr. Justice O'Hagan.*) If a man can be kept in health of body and mind for 15 years, there does not seem to be any reason why he should not be kept in health for 25 or 30 years?—No. I asked Captain Whitty, with reference to this subject, what he thought of keeping men for their lives, and he said, "I see no reason why men "should not be kept for their lives, but after 15 or 16 years, or some such period, I think that there might be a modification of the system, by the men being removed from prison labour to agricultural labour."

3575. (*Lord Stanley.*) A man might be employed in the fields instead of in the prison?—Yes. But I think it very important first to get the practical experience of other countries where they have been dealing with this class of prisoners.

3576. (*Mr. Waddington.*) Have many of these long-sentence men attempted to escape?—No; but they would find it very difficult to escape in Spike island; no doubt they would escape if they had an opportunity. With regard to the punishment, I am satisfied that there is nothing to lead to the conclusion that the men could not be kept still

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longer than heretofore. You cannot expect that a man after 15 years' confinement will be turned out as he came in, because it is a long period of his life. We all change in that time.

3577. (*Mr. Ewart.*) What is the result of your experience of solitary confinement with regard to its effect upon the individual, both mental and otherwise?—I have never seen it tried beyond 16 months, but up to that period I have seen nothing whatever to induce the conclusion that it has had any injurious effect upon the minds of the prisoners. I am referring to separate confinement, or the first stage, which is now for nine months; that period has been fixed, perhaps, as much from economy as from anything else, because you get the prisoners to the public works sooner.

3578. (*Chairman.*) Is there any other point to which you wish to call the attention of the Commissioners?—No.

The witness withdrew.

Monsieur Visschers examined.

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3579. (*Mr. Neate.*) You are a member of the Council of Mines in Belgium?—Yes, which is a substitute for the Council of State, and it is as jurisconsult that I take part in it. I am also a member of the Central Commission of Statistics. As doctor of laws I have occupied myself before in the criminal legislation, and I have been engaged for some years in the revision of the penal code. The penal code under which we are is the French penal code of 1810, with some modifications. I put in the proposal of the penal code now adopted by the Representative Assembly. That proposed code has been for the last two years before the Senate of Belgium. I put in two reports of the Committee of Justice of the Senate on parts of this penal code. I put in also an extract from the judicial statistics of the 10 years of the penal law from 1850 to 1860. In the French penal code Capital Punishment is prescribed in 39 cases.

To what refers to Capital Punishments in the new proposed code, the witness read the following extract from a speech of Monsieur Victor Tesch, the Minister of Justice in the Chamber of Deputies, dated 20th December 1858:—

" La peine de mort est prononcée par 39 articles du code actuel, et " plusieurs de ces articles comprennent un grand nombre de cas différents. Il n'y a pas d'exagération à dire que plus de soixante font " entraîner la peine de mort.

" D'après le projet, la peine de mort n'est plus en réalité applicable " qu'à quatre espèces de crimes:

" 1°. Attentat contre la vie du Roi, ou de l'héritier présomptif de la " couronne.

" 2°. Attentat contre la personne du Roi.

" 3°. Meurtre commis avec préméditation, comprenant l'assassinat, " l'empoisonnement, l'incendie, la destruction de bâtiments, d'édifices, " ayant entraîné la mort de personnes que l'auteur de l'incendie savait " se trouver dans les bâtiments et édifices.

" 4°. Meurtre sans préméditation, comprenant le meurtre des père " et mère légitimes; le meurtre de l'héritier présomptif de la couronne, " le meurtre commis pour préparer, faciliter ou exécuter un autre crime, " ou pour assurer l'impunité des auteurs et des complices de ce crime.

" En matière politique la peine de mort est supprimée.

" Elle n'est plus prononcée pour complicité ou récidive.

" Elle n'est plus prononcée contre les individus âgés de moins de " dix-huit ans.

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" Les peines perpétuelles ne sont plus comminées que dans des cas " très-graves ; elles sont destinées à remplacer la peine de mort."

3580. Will you give an account of the progress of criminal legislation in Belgium since 1830, with your observations upon it as far as regards the punishment of death ?—The progress of society is decidedly towards a mitigation of the punishment. The sentiment of humanity is opposed to a useless rigour beyond any interest of self-preservation, and beyond what the mitigation of punishment is necessary for the purpose of just and effectual repression. Under the Government of the Netherlands there was no capital execution either in 1829 or in 1830, and this absence of executions was continued for four years by the Belgian Government. But at the end of 1834 a change of Government brought into the administration a minister who restored the use of the scaffold. I was then at the head of the branch of legislation in the ministry of 1833 and 1834. I did what I could to induce the minister to continue the experiment of abstaining from executions, and I obtained a commutation of punishment for a man who had been condemned to death for an *attempt* at assassination, but I was obliged in consequence to give up my situation, from taking an attitude of opposition. Some years afterwards I went to Ghent, to the prison there, and I saw this prisoner, who was working and conducting himself well, and making himself useful ; he was employed in the service of the gaol.

3581. At what did he work ?—He was working at the hand-loom, weaving, so that if this man had been put to death society would have gained absolutely nothing. It was in February 1835 that an execution took place in Belgium, after an interval without executions of five years. I was then writing in the Critical Review of Foreign Legislation, which was edited by Professor Mittermaier, and contributed statistics to it.

3582. (*Mr. Waddington.*) Where was that journal published, was it in Brussels ?—No, in Heidelberg. For the last three years they have founded in the city of Liège a society for the abolition of Capital Punishment. I happened to be at a meeting where I was called upon by the president to address the assembly, and I then said that of which I have given the substance to the Commission in the shape of a pamphlet ; it is an historical account of the first attempt of the abolition of Capital Punishment in Belgium from 1831 to 1835. I put in a statistical table with the view of showing that since the beginning of the present century till the year 1834, in our country, crime has diminished, and that there has been a diminution of executions, which is to be found at page 18 of my pamphlet.

The witness read the same, which is as follows :—

EXTRAIT du Tableau joint au premier projet de Révision du Code Pénal.

Périodes Quinquennales.	Total des Exécutions.	Condamnations Capitales.		Totaux.
		Assassinat, Empoisonnement, Parricide.	Autres Crimes.	
1800 à 1804 - -	235	150	203	353
1805 à 1809 - -	88	82	70	152
1810 à 1814 - -	71	64	49	113
1815 à 1819 - -	26	42	29	71
1820 à 1824 - -	23	38	23	61
1825 à 1829 - -	22	34	40	74
1830 à 1834 - -	Aucune	22	38	60

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I put in another table from 1826 to 1860, showing a constant diminution of crime, with the exception of the years 1846 and 1847, when there were special circumstances of temporary distress to account for the augmentation at that time; it is at page 5 of the statistical statement. Notwithstanding there was a slight increase in the general criminality of the country, comparing the two quinquennial periods of 1850 to 1855 and from 1855 to 1860; but that diminution of the number of crimes will be justified partly by some modifications in the law to what concerns the prosecution of the offences punished by hard labour and imprisonment (*réclusion*).

3583. There was no alteration in the law as to Capital Punishment? —Not at all. In the four years from 1846 to 1849 the average number of persons accused of capital crime was 56; from 1850 to 1855 the average was 50$\frac{1}{5}$th; from 1856 to 1860 it was 47$\frac{2}{5}$ths. So that comparing that with the population from 1846 to 1849, there has been one accused of capital crimes out of 77,450; from 1850 to 1855 there has been one accused out of 90,228, and from 1856 to 1860 there has been one accused out of 97,536. This last table comprises only the crimes of murder, poisoning, and infanticide. I put in another table as to burglary and offences with violence against the person. —It should be noticed that in the year 1832 false coining ceased to be a capital offence, and the accusations for such crimes have diminished. The country is divided into three Supreme Courts of Appeal, Brussels, Ghent, and Liège. Since the year 1830, with one exception at Namur, and that exception was a case of parricide, there has been no execution in the provinces which are within the Liège circuit, and in the other circuits where there have been executions crime is most abundant. —Comparing the proportion of acquittals with accusations during the period from 1850 to 1860, it appears that the proportion for general crimes is 26 to 100, and for capital crimes 42 to 100. I refer to pages 32, 34, and 36 of the judicial statistics; there will be seen at the latter page the proportion of executions and condemnations since 1830. The general character is one of great mitigation in the law. From 1856 to 1860 there have been four executions upon 100 convictions; from 1861 to 1865 there have been five executions out of 82 convictions, whereas from 1846 to 1850 there have been 18 executions out of 213 convictions, and from 1851 to 1855 there have been 17 executions out of 141 convictions. I refer to page 111 of the judicial statistics, which is the most curious page in the whole book. It gives a table of all crimes and offences of which the existence was proved, but of which the authors were not detected, from the year 1840 to 1860.—My conclusion is, first, that Capital Punishment is not deterring, since, as it appears from so many crimes, the guilty have a chance of not being detected. If they are prosecuted at the Assizes for capital crimes, they have 42 chances per cent. of an acquittal; 58 per cent. would be punished in some way or other, and seven only out of the 100 condemnations to death have been followed by execution. As medical adviser of society, I would advise them to adopt another system. Secondly, I think that Capital Punishment is not necessary for the maintenance of social order. In the province of Liège there has not been one execution for the last 41 years, and it is in that province that there are the least crimes. Thirdly, I have also to urge the objection of the liability to mistake, of which I can give instances. On the 12th of May 1842 three poor hawkers were condemned to death for crimes committed under the most aggravated circumstances of the penal code. Those three men were exposed on the public place; their punishment had been commuted by the King into perpetual imprisonment with hard labour. When they

were quitting the prison, a prisoner said to them, "Go quietly, my "friends, to acquire your heaven on the public square; you will go "there as innocent men, for it is I who committed the crime." Upon inquiry that prisoner persisted in his confession, and informed against his accomplices. These other three men were tried and condemned, two to death and one to hard labour for life. The two judgments being contradictory, were annulled by the Court of Cassation. There were fresh trials, and the three first men were discharged. I wish to draw the attention of the Commissioners to the 351st art. of the Code of Criminal Instruction (modified in Belgium by a law of the 15th of May 1849), according to which, if the guilt is only pronounced by seven to five, the Court then takes it in hand. In the case which I have mentioned, the Court concurred with the majority of the jury in deciding that those men who were afterwards found to be innocent were guilty. An annuity for life was given to the three innocent persons. The details of this case will be found in a publication called *La Belgique Judiciaire*, in the 1st volume for the year 1843.

3584. (*Mr. Neate.*) What is the progress of ideas in Belgium respecting the abolition of Capital Punishment?—There is an association at Liège for its abolition which has published several reports. In the Representative Chamber a good many members have spoken in favour of the abolition of Capital Punishment. Many eminent magistrates and judges, especially the First President of the Court of Appeal at Liège, are avowed advocates of the abolition of Capital Punishment. But it is a question as to which the bulk of the population requires to be enlightened. My own opinion is that what is chiefly required for the repression of crime is a better system of police, beginning with the public prosecutor down to the detective policeman. Then, the greater the moderation of penalties, the greater the certainty of repression.

3585. (*Mr. Ewart.*) That is the doctrine of Beccaria?—There is a feeling which prevents us either from murder or theft, which comes to us from education. It is to education that we must look for a diminution of crime. The old system of laws rested entirely upon intimidation and fear. The keystone of that system was Capital Punishment. But it is worthy of a civilized nation to require a system which, while it protects society, looks to the improvement of the criminal. We may look at perpetual imprisonment as effectually supplying the place of Capital Punishment. In my Memoir I have represented how, under the reign of Maria Theresa, they endeavoured to supply the place of Capital Punishment by imprisonment in subterranean dungeons; but it was found necessary to give up that on account of its excessive cruelty. Experience alone will point out the punishment which can effectually supply the place of Capital Punishment, but it is within my knowledge that several persons who had been condemned to death have some years later been restored to society and have lived in an inoffensive manner; on which grounds I persist in believing that this punishment is not necessary for the preservation of public safety.

3586. What substitute for Capital Punishment is there in Belgium?—Perpetual imprisonment with hard labour.

3587. How has your substituted system succeeded?—The present system is not yet in a proper state of working. The imprisonment for life has not received those improvements of which I think it is capable; and the separate system not being yet established by law, is only inflicted as an exceptional punishment. I maintain a very favourable opinion of the English and Irish system, beginning with separate confinement, and then changing it to confinement upon public works with hard labour; and I contrast it favourably with the German system,

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which is separate confinement without mitigation and without hope of shortening the sentence.

3588. (*Mr. Neate.*) Is what is called perpetual imprisonment in Belgium in fact perpetual?—No; most all prisoners condemned for life die in confinement, but in many instances likewise, even in the case of murder, the punishment has been gradually commuted to 20 years, and later only to 12 or 15 years' imprisonment. I may mention a case of a girl, who, after two attempts to poison her aunt, because she was opposed to her marriage, at last succeeded the third time in doing it; her punishment was first commuted to perpetual imprisonment, and then to imprisonment for a limited time, and after 12 years she was let out, and was married and is the mother of a numerous family in her native village.

3589. For these reasons would you recommend an immediate abolition of the punishment of death?—I think that society is tending in that direction, and that, however, it may be resisted, society will come to it; but society should prepare itself for that result, and probably society is not ready for it now; I speak of Belgium. But if you wait till the Government is ready, it will never take place. Therefore it is necessary to urge and press the Government to that end.

3590. (*Mr. Justice O'Hagan.*) Do you know the condition of the discipline of the Ghent prison, of which Sir Walter Crofton has spoken?—The separate system of imprisonment has not been introduced in that prison as a general system.

3590*a*. Is there any Belgian prison in which persons sentenced to imprisonment for life are separated from the other prisoners?—The present state of the law in Belgium did not admit of till now separate or cellular imprisonment as punishment. But all our new prisons are built in foresight of the adoption of the separate system of confinement.

The witness withdrew.

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Sir Mordaunt Wells examined.

3591. (*Chairman.*) You were a barrister before you went to India?—Yes, for 18 years.

3592. In what year did you go to India?—In January 1859.

3593. In what capacity did you go out?—As Judge of Her Majesty's Supreme Court of Bengal.

3594. How long did you hold that office?—For nearly five years.

3595. During that period had you the new Indian penal code under your observation?—Yes; when I first went out to India the criminal law administered in the Supreme Court in Calcutta was very much the same as the English law; it was under an Act of 9 Geo. 4., consolidating the English criminal law, and we administered in the Criminal Court in Calcutta the English law to Europeans and natives.

3596. (*Mr. Waddington.*) With a jury?—With the assistance of a jury, there being no juries in civil cases.

3597. Were the jury composed of British subjects, or of Indians?—Under ordinary circumstances the jury consisted of four natives, and eight Eurasians and Europeans. Of course that could not always be the case; sometimes all the natives were challenged, and sometimes all the Europeans were challenged, and then we were obliged to take the jury as we could from the panel.

3598. I suppose that you required interpreters?—Yes; we had very able interpreters in the Supreme Court, men of high standing, and highly paid officers. In criminal cases there were two interpreters,

one interpreting to the prisoner, and the other interpreting the evidence to the court. *Sir M. Wells.* 25 Mar. 1865.

3599. Confining yourself to the law of murder, as long as the English law was administered, how did you find it work in India? Did the juries generally give verdicts according to the evidence, or did they acquit persons from the fear of inflicting Capital Punishment?—I should say that in all the cases which I myself tried, some eight or nine capital cases, the juries returned correct verdicts; but I ought to state that it required a strong summing up on the part of the Judge to keep the jury clear on the distinction between murder and manslaughter; and that there was a disposition, I think, on the part of the jury in three or four of the cases to find a verdict of manslaughter instead of murder. But I think that probably they were influenced by the summing up of the Judge; and I think that the juries in India are more influenced by the court than the juries in England.

3600. Under that influence, as long as the English law was in force they generally returned correct verdicts?—Yes, both as regards Europeans and natives.

3601. Will you shortly state what the change was which was introduced by the new code, confining yourself to the law of murder?—When I first went out to India the penal code was under discussion in the Legislative Council; it was before a committee of the Council. A short time previously to the bill coming before the Legislative Council, Lord Canning appointed me a member of the Legislative Council, and I prepared myself to take a part in the discussion upon that bill. I was obliged to retire in consequence of my health, and I was only a member of the Council for a short period; but I took a very great interest in the penal code. I was in constant communication with the Chief Justice during the time that I was a member of Council, and I frequently consulted him when the penal code was in operation.

3602. Will you shortly state the principal changes which were made from the English law of murder?—The great change in the code is in the definition of murder under section 300, establishing the principle of showing in all cases of murder a clear intention on the part of the prisoner to commit the offence, and getting rid altogether of the great difficulty which exists in the English law as to presuming malice.

3603. I see that it does not confine the intention to causing the death, but it says, "If it is done with the intention of causing such "bodily injury as the offender knows to be likely to cause death?"—Yes, I see that in Mr. Stephens' evidence he called the attention of the Commissioners in detail to section 300, and to the exceptions. The definition of murder, according to the English law, is of course very different now from what it is in the Indian penal code. The exceptions in the Indian code are very important, and with regard to the fifth exception, I see that a question was put to Mr. Stephen, and I had perhaps better explain the meaning of that fifth exception, because there seemed to be some little doubt in the minds of the Commission as to its meaning. The fifth exception is, "Culpable homicide is not "murder when the person whose death is caused, being above the age "of 18 years, suffers death or takes the risk of death, with his own "consent." The framers of the penal code, the late Lord Macaulay and the three gentlemen who assisted him, reported specially upon that exception to the Governor-General in Council, and the feeling of the Chief Justice seemed to be that there ought to be a distinction between a case of murder and a case where a man voluntarily consents to have his life taken away, in such cases the motives are not so bad as those which prompt men to the commission of murder. For

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instance, there is the offence of Suttee, and in the penal code, as brought into the Legislative Council, there is an illustration which is now omitted, which I think shows exactly what was intended by the original framers of the bill. In that illustration they put the case of a widow of a native above the age of eighteen voluntarily consenting to be burnt, and a party igniting the faggots, and so causing her death; and I think that it would certainly be very undesirable that as long as that practice continues amongst the natives (it is now almost abolished in some parts of India), that such an act should be treated as murder; but I go rather further than that, I think that in all cases where a party consents, unless it can be shown that the party is under a certain age, or is a lunatic or deprived of reason, there ought to be a distinction between such a case as that and a case of deliberate murder.

3604. For instance, you would say that if two persons agreed to commit suicide by drowning, and one of them is drowned and the other escapes, the person escaping should not be guilty of murder?—Yes. I think also that this section is a very valuable section in reference to a crime which used to be very prevalent in England, but which is not so now, namely, duelling. According to the law of England, not only is the principal in a duel guilty of murder, but the seconds of both parties are guilty of murder, and even parties present, who are not seconds, are considered, according to the law of England, to be guilty of murder. There are several decisions upon the subject, and I believe that I am stating correctly that that is the law of England at the present time. I think that that is a very harsh law, and that it is one which certainly ought not to remain.

3605. The provision as to a person taking the risk of death with his own consent would cover the case of duelling?—Yes; and therefore I think that the exception is valuable with reference to the state of society in England as well as in India. There are other cases, but that was the object of those who passed the Act, and the reasons are stated at great length by Lord Macaulay in his report to the Governor-General in Council after the completion of the code.

3606. Is not the principal change that this code excludes from the definition of murder certain cases which by the English law are murder, where there is no intention to kill, or no infliction of injury which would obviously lead to death?—Yes; I think that it would be useful if I were to read to the Commission the explanation of the Chief Justice. After the penal code had passed through the Legislative Council, the Chief Justice, Sir Barnes Peacock, who was a lawyer of very great eminence in this country, made the following explanation. He said, "The English "law defined murder to be the killing of a man with malice prepense. "Now, what was meant by malice prepense? The English law in- "ferred it from certain acts, though in fact it might not exist. If a "man was engaged in an unlawful act, and in doing it killed another, "it was presumed he meant to commit murder. Suppose, by way "of illustration, that a man shot at a hen for the purpose of killing and "stealing it, and killed a boy, not knowing that the latter was hiding "behind the bush; according to the English law, because he was guilty of "an unlawful act in shooting at the hen, he would, by the construction "of the law, be held to have had a malicious intent against the boy, "and he was liable to be hanged. But this code did not allow any "presumption of malice, but got rid of all such difficulties by providing "that culpable homicide was not murder unless the act by which death "was caused was done with the intention of causing death, or with "the intention of causing such bodily injury as the offender knew to "be likely to cause death, or as was sufficient in the ordinary course

" of nature to cause death, or with the knowledge that the act was *Sir M. Wells.*
" so imminently dangerous that it must in all probability cause death, 25 Mar. 1865.
" or such bodily injury as was likely to cause death. For instance, if
" a man gave a slight blow to another who had a diseased spleen, and
" who died in consequence of that blow, if he knew that that man was
" labouring under such a disease, and that the blow was likely to cause
" his death, he ought to be punished for murder. But if he was igno-
" rant of the man having a diseased spleen, and gave him a box on the
" ear, and death ensued, it would not be right or proper to hang him,
" and this code therefore made provision accordingly. It was true
" that a man had no right to jeopardize another's life, but still he ought
" not to be punished for murder in respect of an act which, he (the
" vice-president) would not say, might be tantamount to an innocent
" act, though it was something like it." Then there is the following passage, which has an important bearing upon the question before the Commissioners: " There were only four cases in the whole code in which
" a man might be sentenced to death, and even then it was left discre-
" tionary with the judge, instead of passing a Capital Punishment, to
" sentence him to transportation."

3607. Which is the section of the code to which you refer ?—I will call the attention of the Commissioners to those four cases: " He
" should be glad himself if Capital Punishment could be abolished
" altogether, though probably the time had not yet arrived for such a
" measure."

3608. (*Mr. Justice O'Hagan.*) In every case the Judge can pronounce a smaller sentence ?—In every case, with one exception, murder by a life convict.

3609. (*Mr. Waddington.*) Which is the section of the code ?—The first section is the 302nd, which provides a capital sentence for murder.

3610. " Whoever commits murder shall be punished with death or
" transportation for life ?"—Yes. Then there are " offences against
" the State." Section 121 provides the punishment of death for waging or attempting to wage war or abetting the waging of war against the Queen. Then there is a very important section, namely, the 194th, with reference to giving or fabricating false evidence with intent to procure conviction of a capital offence. If an innocent person be thereby convicted and executed, the person giving such false evidence is punishable with death. I may say that that is a more important section with reference to the state of society in India than it would be here.

3611. (*Chairman.*) That section says " that the person who gives
" such false evidence shall be punished either with death or the
" punishment herein-before described ?"—Yes. Then there is dacoity with murder, which comes under the head of murder. I do not put that as a substantive class. If five persons are out dacoiting, and A. shoots, under that section B., C., D., and E. would be convicted of murder.

3612. What section is that ?—The 369th. " If any one of five or
" more persons, who are conjointly committing dacoity, commits
" murder in so committing dacoity, every one of those persons shall
" be punished with death or transportation for life, or rigorous im-
" prisonment for a term which may extend to 10 years, and shall also
" be liable to fine."

3613. (*Mr. Waddington.*) I suppose that in all these cases of murder the law of accessories and persons aiding and abetting would apply ?—

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Yes, it comes under the head of "Abetment" in the penal code. Any person who is abetting murder would suffer death.

3614. What is dacoity?—It is a very similar thing to a gang robbery. They go out sometimes to the extent of 30 or 40, and plunder a house, and not infrequently kill the inhabitants.

3615. That does not alter the law of murder?—No.

3616. They would not commit murder in committing dacoity unless they either intended to kill, or committed some injury which was likely to kill?—Just so. I think that the alteration in the law in India with reference to murder is very important in one respect—it gets rid of a very large class of cases which I have always thought a disfigurement to the criminal law of England. I will take, for instance, the case of night poaching. I have known cases where four or five men have gone out, and of course people going in pursuit of game are necessarily armed; it is not like proceeding to rob—they need not take arms for the purpose of robbery, but they go out with arms for the purpose of poaching. The keepers attack them, and a contest ensues between the parties, they become excited, and sometimes one man in a state of excitement will kill a keeper, and he is guilty of murder, but I have always thought that the other parties, who went out without there being a positive intention on their part to take away human life, should not be guilty of murder, and under the Indian penal code no such conviction could take place.

3617. It would be left to the jury under the present law, whether they went out with a common intention to use violence if they were resisted; if the jury found that they did so, all of them would be parties to the act, and would be guilty of murder?—Yes; I consider it a very harsh measure, and it is one which is altogether got rid of in the Indian penal code.

3618. Then you approve of this change from the English law as regards constructive malice?—Yes; I had great experience in the working of the code in the first instance, and I found it work admirably. In the two cases of murder which I tried after the passing of the penal code, I found myself very much disembarrassed of the difficulties that I had experienced in other cases which I had tried under the old law. I had no difficulty whatever in dealing with the code in placing the matter before the jury, and I found it to work well.

3619. (*Chairman.*) Do you think that the ease with which you found it work in those two special cases was in consequence of your having the alternative of Capital Punishment or imprisonment?—Not at all so, because the two cases which I tried were cases of such a very aggravated character, that no such question at all could arise. One was a case of a native who had dug the murdered man's grave five or six days before he had committed the murder; and the other was a case of a very aggravated character, and therefore there would be no difficulty in a case of that kind; but as long as Capital Punishment remains in such cases as those, the Judge would always, of course, exercise a sound discretion in passing the sentence of death.

3620. (*Mr. Waddington.*) Will you turn to the section regarding manslaughter; that was a considerable change in the law?—Yes.

3621. Do you approve of it?—I do entirely; you mean with respect to provocation.

3622. Yes?—I think that that is one of the most valuable alterations in the law; it is the first exception to section 300. "Culpable homicide "is not murder if the offender, whilst deprived of the power of self-"control by grave and sudden provocation, causes the death of the "person who gave the provocation, or causes the death of any other

" person by mistake or accident." I object to one word in that exception, namely, the word "sudden." Had I been a member of the Legislative Council when this clause was brought before the Council, I should certainly have endeavoured to have got rid of that word, because in a great many cases in India, although the provocation may not be sudden, still it is of such a nature as I think would make it quite justifiable to consider it such a provocation as not to make a man guilty of murder. For instance, there may be an insult to a high caste native, either a Mahomedan or a Hindoo; I think that the feelings of the natives ought to be respected, and if language is used to them exciting them so as to arouse their anger (and they are very excitable upon questions of religion), and if a man's life is sacrificed in consequence of an attack upon the religion of a native, I think that that is a sufficient provocation to take the case out of the category of murder; and even if the provocation had been given some time before, I still think that if the man was under a state of excitement in consequence of such provocation, it is a provocation which ought to reduce the crime to culpable homicide, not amounting to murder.

3623. Would you introduce that into the law of England? Do you think that a previous provocation by words would be sufficient to reduce the offence to manslaughter?—No; I think that the exception as it stands is too large in reference to England, but I am strongly of opinion that the law of provocation as laid down in our books is certainly too narrow.

3624. You mean the law which confines it to provocation by blows?—Yes; for this reason, that there must actually be an assault of such a character as to amount to a provocation. In one case which was tried before the Lord Chief Baron, he felt very much difficulty upon the question; it was a case where there was a very light assault, which he considered was not a sufficient assault to amount to a provocation in law, and he told the jury to take into consideration the language and the demeanour of the party who had committed the assault, and by putting the two things together in that way, the jury under that direction found the provocation. Now it is perfectly clear that if, in point of law, the assault was not sufficient, then, according to the law of England, the use of any number of words, or any demeanour, on the part of the man, would not be sufficient. Therefore, I think that that ought to be got rid of.

3625. You would alter the law of murder in that respect?—Yes.

3626. Would you adopt this modification, " Whether the provo-" cation was grave and sudden enough to prevent the offence from " amounting to murder is a question of fact"?—Yes.

3627. You are aware that in England the law is always laid down to the jury by the Judge; he tells them in distinct terms, " This is a " provocation which will not reduce the crime to manslaughter;" and sometimes he says, " I will not take your verdict if you find it man-" slaughter"?—The alteration in the penal code in that respect was made after great consideration, and I entirely concur in the strong expression of opinion by the Chief Justice that it is most desirable that in murder, such a question as that of provocation, it being a plain question of fact, should be decided by the jury.

3628. They are to decide not only whether it is grave and sudden that certainly would be a question for the jury), but they are to decide whether it is grave and sudden enough?—I should in no case feel a difficulty in submitting it to the jury. I should say that what the jury would have to find would be, whether there was a sufficient provocation, and that is the way in which I think that a Judge would put it to them;

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as men of the world they would have no difficulty in finding whether or not the gesture or language of a man was calculated to create violent passion in the prisoner.

3629. They might also say whether the particular provocation was one which reduced the offence to manslaughter; you would leave the whole question to them entirely?—Yes. Under a very valuable Act which was passed by the Legislative Council, partly at my suggestion, it is competent for the jury to find a verdict of culpable homicide, not amounting to murder. When the penal code first came into operation some difficulty arose in framing the indictments; the Chief Justice, and the Judges of the High Court, thought it necessary to have inserted in an indictment for murder the exceptions, and then to negative the exceptions. I found this extremely embarrassing.

3630. The word "manslaughter" is not used in the Indian code?—No.

3631. But it is "culpable homicide"?—Yes; and in the Indian code we have abolished the distinction between felony and misdemeanour; and I think this alteration a great improvement in the law.

3632. I suppose that under the Indian code, as well as under our law, upon an indictment for murder the jury might find a verdict of culpable homicide, and not murder?—Yes. The Act of the Legislative Council to which I have just alluded contains the following section, which was suggested by myself, there being a difficulty as to the form of the indictment: "In an indictment for murder it shall be sufficient "to state that the person charged with the offence did murder the "deceased by doing an act with the intention of causing the death of "a human being, or, as the case may be, doing an act with the intention "of causing such bodily injury to the deceased as the offender knew to "be likely to cause the death of the deceased." We so got rid of the difficulty of a complicated indictment.

3633. What is the extreme punishment for culpable homicide, not amounting to murder?—Imprisonment for life.

3634. The same as the second punishment for murder?—Yes.

3635. There is no power to pass a sentence of penal servitude for a term of years for murder?—No.

3636. There seems to be no case in which the Judge is obliged to pass the sentence of death for murder; he is bound to pass the sentence of death or imprisonment for life?—In section 303 you will find that in the case of murder committed by a life convict there is no discretion in the code.

3637. "He shall be punished with death"?—Yes.

3638. (*Mr. Neate.*) Comparing England and India together, which country should you say was the most favourable, or the least unfavourable, to the abolition of Capital Punishment, taking into consideration the different character of the populations?—It is a difficult question, but I think that I am prepared to state my view. The difficulty arises in consequence of the mixed character of the Indian population. Of course if you had all Hindoos or all Mahomedans, or all Christians, there would be no difficulty, but the difficulty arises in this way. The secondary punishment as regards Europeans is a very imperfect system, perhaps the most wretched system in the world. I have known European prisoners kept in the common gaol in Calcutta for a long period under sentences for very bad crimes. I have known them herded together without any separate system, in fact, in some instances they have broken out of the gaol, and afterwards returned, so that the secondary punishment for Europeans is a very imperfect one. The silent system

has been recently adopted to a limited extent in the European gaol at Ootacamund.

3639. My question was rather as to the different character of the populations of England and of India. In your opinion, which of the two countries is most favourable, or most unfavourable, to the mitigation of the existing code, so far as respects Capital Punishment?—I think that Capital Punishment could be abolished more safely in England than in India. My reason for saying that is this, that the police in India are in every respect inferior to the police in this country. Many Europeans live hundreds of miles distant from the presidency towns in isolated districts, and they are surrounded by a population, in their habits and manners altogether foreign to them, therefore, I think that it would be a dangerous thing to try the experiment in India before it was tried in England. Then as regards the natives, I have a very strong feeling that it would be unadvisable in reference to them that Capital Punishment should at present be abolished altogether. Many of the Europeans are men of bad character, and they frequently assault the natives, and I think that if you abolished Capital Punishment in India, with the police that you have there at present, there would not be a sufficient protection and security of life for the natives.

3640. Then you would keep up Capital Punishment against the Europeans?—Certainly. I have visited every part of India, and in my opinion the natives for the most part are a very inoffensive race of people, are tractable and amenable to the law; I consider that in the presidency towns the lower class of natives are more civilized and amenable to the law than the lower class of people in this country. For these reasons I think that until the experiment has been tried in this country, it would be dangerous to try it in India.

3641. (*Mr. Waddington.*) How many Europeans have been executed in cases tried before you in India?—Not one. There was a case tried of the Queen *v.* Rudd, for shooting a native. It came before me, and I charged the grand jury; the case was postponed; Sir Charles Jackson tried the prisoner, and he was executed. I was not in Calcutta when that man was tried. I should like, if I may be permitted, to state the opinion which I entertain of the advantage of the discretionary power now vested in the court under the penal code in cases of murder.

3642. Would you introduce that into the English law?—Decidedly, it is one of the greatest improvements.

3643. Will you give us your reasons for that opinion?—A case was tried before me of four Europeans for an assault upon the police in the gaol in Calcutta, they assaulted the police by hurling stones, and one of the police was killed upon the spot. Although they were all acting together in concert in an unlawful riot, it was shown to me satisfactorily, and I was clearly of opinion, that only one of the prisoners had taken an active part in the throwing and hurling of the stones, and I thought that that man had probably caused the death of the policeman, although it was not distinctly shown by the evidence. I summed up the case reluctantly to procure a conviction for murder against all four, as I considered that it came clearly within the principle of the English law, that these parties were all acting together with one common intent in an unlawful act.

3644. Was this under the old law?—Yes, I summed up the case very strongly, it being very important I think whatever the Judge's opinion may be as to the law, still to carry out the law, and I procured a conviction against all four. I had then to pass sentence of death upon the four, which I considered a perfect mockery, because I was satisfied that three of the men out of the four would not be executed. It had

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occurred once before whilst I was upon the bench in India; and I think it the most solemn mockery which can take place, for a Judge to pass the actual sentence of death upon a fellow creature, when he knows that that sentence will not be carried out, and that in the course of a few hours it will be known that what has taken place is all a mockery. In that case, after the court was up, I went direct to the Lieutenant-Governor, who has the power of commuting sentences in India. I immediately procured a commutation of the sentence against three of those men, and it was communicated to them that night; the case of the other man was afterwards a subject of much discussion, and the reasons set forth, which are very important as bearing upon the question before the Commission, are stated by the Lieutenant-Governor in a minute which he wrote with reference to commuting the sentence of the fourth man to transportation for life. He commuted the sentence with my concurrence and the concurrence of the Chief Justice whom I consulted. Now under the new law that difficulty would not have arisen. I should have passed sentence of death upon one prisoner, and I should undoubtedly have passed the secondary sentence upon the other three prisoners. I think that it is a great disadvantage that sentence of death should be passed, and that within a very few hours it should be published to the world that those persons are sentenced to a secondary punishment.

3645. Might not that inconvenience be obviated to a certain extent by enabling the Judge to record the sentence instead of passing it?—I do not think that that is quite understood, and it certainly would not be understood in India When I practised at the English bar I always thought that recording sentence of death was almost a fiction; that in many cases it would be much better at once to pass the real sentence publicly in court upon the party, instead of recording sentence of death. I never could understand the use or the value of it. I wish to state that, besides my experience in Calcutta, I travelled through the north-west, the Punjaub, Bombay, Scinde, and Madras, and portions of Central India, and I placed myself in communication not only with the European, but with the native magistrates; and I believe that, both classes of judicial officers approve of the new criminal code, that they have found no difficulty in working it, and that throughout India it is considered a very great improvement upon the law which prevailed in the Mofussil, which was substantially the Mahommedan law altered by British regulations and the English criminal law in the presidency towns. I believe that up to the present time it is working admirably throughout India. I think that it is the most humane, and at the same time the most just, criminal code in the world, and that the Queen's subjects in India have a far better criminal code than the people of England. I think that in another respect the code is very valuable, namely, with regard to the law of abetment.

3646. Is there a special provision as to infanticide in the new Indian code?—No. I see that one gentleman, namely, Mr. Stephen, has suggested an alteration in the law with respect to infanticide. I am strongly opposed to that, although I am very much in favour of an amelioration of the criminal law in many particulars. I had great experience whilst I was at the bar on my own circuit, in cases of that kind, and I have often conversed with the Judges respecting such cases. I consider the deliberate murder of an infant as foul a murder as can be committed. I consider that it is debasing and demoralizing to society, and that it often leads a party who commits a murder upon an unprotected being like an infant, to commit the same offence again. I think that it is the worst class of murder. At the same time I quite sympathize with those who feel that there are certain cases where the

state of the mother and her feelings ought to be considered, which necessarily creates in the minds of the jury very great sympathy, and often leads to juries giving wrong verdicts. I, however, think that that might fairly be met by a very simple alteration in the law, which would do a great deal of good, namely, that without altering the definition of the crime, leaving it still murder, there should be a power in the jury to find extenuating circumstances.

3647. In those cases only ?—Yes ; and then that there should be a power in the Judge to pass sentence of transportation or imprisonment for any term ; for instance, I think that that would put the whole question of infanticide upon a proper footing.

3648. (*Chairman.*) How would you define the cases in which you would bring that power into operation ?—I would allow in every indictment which was tried the jury to find extenuating circumstances.

3649. How would you define infanticide ?—I would limit the age of the child. I would say in the indictment, such and such a child being of the age of a fortnight or three weeks, and as to those cases I would allow extenuating circumstances. I would certainly not go beyond the period of three weeks. I would take that as the time when a woman fairly recovers her strength, and the natural disturbances, physically and mentally, which might sometimes lead her to the commission of the offence then ceases, and after that period, it is to my mind as grave an offence as can be committed.

3650. (*Mr. Ewart.*) One reason has been alleged in palliation of infanticide, namely, that the loss to a child is not so great as to an adult person, a child not being the same as an adult, either in life or in society, and not having so many advantages. Would not that argument apply to an extremely old and imbecile person ?—Certainly ; we should then have to consider the value of each person's life in society. I do not think it possible in the criminal law to make a distinction of that sort. But it is to be taken into consideration, that it is very much against the interests of society that infants should be destroyed ; they are the most helpless beings in the world ; there are greater facilities attending the murder of an infant than of an adult, and therefore I think that it becomes necessary that the law should protect infants in every possible way.

3651. (*Chairman.*) As I understand you, you would consider infanticide to be the murder of a child within three weeks of its birth, and you would enable the jury to find a verdict with extenuating circumstances, and you would attach to that crime the penalty which you would attach to murder, namely, either death or transportation for any period ?—No ; when the jury found extenuating circumstances, I would remove it from the category of Capital Punishment, and would reduce it to a case of culpable homicide as under the penal code.

3652. (*Mr. Ewart.*) Suppose that the jury do not find extenuating circumstances ?—Then it should be murder.

3653. Do you think that infanticide is too lightly looked upon in this country ?—I think that there is an improper sympathy upon the part of a certain class of people ; that they do not look upon the life of an infant in the same way as they do upon the life of an adult ; and that they do not consider that in taking away the life of an infant much harm is done. Some people go the length of saying that taking away the life of innocent persons cannot do them any harm.

3654. (*Mr. Justice O'Hagan.*) Did you find in administering the Indian code that the exceptions puzzled the juries ?—No ; I did not.

3655. Did you find it easy to convey the matter to them ?—Yes; but I have a very strong objection to the illustrations. During the time

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that I remained in the Legislative Council I opposed every illustration that was introduced. The enacting clauses and definitions contain the whole law, and the illustrations make nothing law which would not be law without them. The value of an illustration depends entirely upon whether you can submit a case to the jury within the four corners of that illustration. If you do not bring the case within the illustration, it is made a handle of by counsel using it for the purpose of making out that the offence did not come within the provisions of the penal code. And I think that in any code which may be prepared for this country, such illustrations ought not to be introduced. The explanation on the part of the framers of the Indian code is this, they say that the Judges in the Mofussil are not trained lawyers, and that the illustrations will assist them in construing the code itself. I do not think so. I think that it is a very dangerous thing; it leads a Judge, instead of really working hard at the enacting clause itself, and getting his mind thoroughly informed as to what is the law, to take hold of one of the illustrations, and probably put it to the jury without clearly and accurately stating what is the law. I think after the experience which I have had in the actual working of the code that those illustrations are certainly calculated very much to embarrass the administration of justice and to mislead jurymen. But I think the exceptions are exceedingly valuable.

3656. (*Mr. Ewart.*) Are these illustrations peculiar to the Indian code, or are they to be found in any other code; they are not in the code Napoleon?—They are not in the code Napoleon, and they are not in Livingston's code. I think the introduction of these illustrations, if I may use the expression, is a fanciful piece of legislation. The code was prepared by very eminent men, but they had not had any practice at the bar; the late Lord Macaulay was the Chief Commissioner, and if he had had any experience at the bar, I do not think that he would have adopted those illustrations. The four Commissioners were Lord Macaulay, Mr. McLeod, Mr. Anderson, and Mr. Millett; there was not a practical lawyer among them.

3657. (*Chairman.*) Have you considered the general question of the abolition of Capital Punishment as applied to England?—That is a matter which I have very much considered. I have looked at it in all its bearings as a practising lawyer, and as a Judge, and I have come to a reluctant but deliberate conclusion that it would be unadvisable at present to abolish Capital Punishment, for this reason: There are a certain class of cases, such as burglary, rape, mutilation, and robbery from the person, which are not punished with death, and I think that if you place the punishment for murder upon the same footing as those cases, you will remove the restraining motive. A man committing a rape would be glad in many instances to remove the person upon whom he commits it, because it would get rid of probably the only evidence against him, and I am perfectly satisfied, the more I look into the matter, that in many cases the fear of an ignominious death does act as a restraining motive to protect the object of violence at the time. I think that in the case of burglary it is the same; three or four men breaking into a lone house, in which there are elderly people, often commit acts of violence, but stop short of the crime of murder. The temptation and the motive is very considerable to take away the lives of those parties, but I think that there again the restraining motive acts upon the mind of the culprit, and that he stops short of the commission of murder. I think that the English law as regards the definition of murder, and in many other respects, requires great alteration. If the English law is to remain as it

present, I certainly should pause for a considerable time before I came to the conclusion that Capital Punishment ought not to be abolished. For instance, in a case where a man goes for the purpose of stealing a particular object, and in the act of stealing he kills that object, but also kills a human being, I think that it is a barbarous law that that man should be found guilty of murder; but I think that probably those inconveniences will not exist long, and therefore, with reference to the class of crimes which I particularly mention, I think that at present it would be necessary for the security of life that the State should inflict upon a murderer Capital Punishment with the view of giving proper protection to society. I am very strongly of opinion that Capital Punishment ought to be abolished in all cases except in deliberate murder, where the intention is clearly shown beyond all doubt.

3658. (*Mr. Waddington.*) You think that there should be a clear intention to kill. Do you think that there should also be a premeditated intention?—No, a clear intention.

3659. A clear intention springing up at the moment?—Yes, unless the motive of the man can be removed by provocation. One or two very strong arguments have been used in favour of abolition, but they go, I think, more to the amelioration of the crime of murder than to the question of the abolition of Capital Punishment. I may also observe that I think that the ends of justice are frequently frustrated by the removal of a prisoner from this world. I think that in a case where three or four persons are engaged, you very often have not the worst criminal before you, and that very frequently the ends of justice are frustrated by that person being hung; and, except in very aggravated cases, such as the cases which I have mentioned, I think that it would be for the interest of society that the culprit should not be removed, for although a man keeps back from the authorities the truth with the view of saving his own life, life being so dear to every man, I am perfectly satisfied that, supposing that a prisoner could have a reasonable time to reflect upon his conduct, he would very often divulge facts to the police or to the Government which might lead to the conviction of a gang of men much worse than himself, and therefore I think that in such cases the ends of justice would be furthered by a prisoner not being executed.

3660. (*Chairman.*) I understand you to state that you would retain Capital Punishment in this country for certain cases of murder to which you have alluded. Would you define Capital Punishment in the form of the 302nd clause of the Indian code, namely, "that persons shall be "punished with death or transportation for life;" would you give the alternative to the Judge?—Certainly, for the reasons which I have before given.

3661. (*Mr. Justice O'Hagan.*) In every case you would give that alternative?—In every case.

3662. (*Chairman.*) You would retain Capital Punishment for murder in this country, with the alternative of transportation for life, in the discretion of the Judge?—Yes. I do not say that there are not imperfections in this code, but I think that if the same alterations were made in England with respect to the law of murder, many intelligent persons whom I know, and who are now in favour of the abolition of Capital Punishment, would be of the contrary opinion; but it is the absurdities in the English law which, I think, cause a very great prejudice in the minds of a great many persons as respects Capital Punishment.

3663. (*Mr. Neate.*) Do not you think that if the Judge has the discretion in every case of deciding whether it is murder or manslaughter, his mind is likely during the trial to be engaged in the consideration

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of whether the offence is murder or manslaughter in a way which would divert him from giving attention to the evidence?—No, I have never found the slightest difficulty. I have always kept my mind intent upon the evidence, and it is only at the end of the case, when the whole evidence is before the Court, that the Judge's mind is formed as to the way in which he should put the case before the jury, and it is then that he forms his deliberate opinion upon the case, so that I do not think that it would lead to the slightest embarrassment.

3664. (*Mr. Justice O'Hagan.*) Men's minds are so differently constituted, that if you gave that discretion to the Judge, you would have very inconsistent decisions as to the character of the offence upon which sentence had to be passed. Do you think that that would have any bad effect upon the public mind?—I think not. I think that upon so important a question as the exercise of a discretionary power in cases of murder, in the course of a very short time the whole matter would settle down to a uniform and well recognized practice, as all these things do with the Judges.

3665. (*Mr. Waddington.*) Are you sure of that?—I think so upon the whole.

3666. Are you aware that at the present moment the Judges of England differ to an extraordinary degree in the sentences which they pass, in the case of rape for instance?—I agree in that, but I think that this is an exceptional case. Perhaps I went a little too far, and I perhaps am not so well able to speak upon the generality of cases, but having had the responsibility of a Judge, I think that in the course of a very short time the matter would be settled, and that there would scarcely be a case in which the distinction would not be recognized by all the Judges, and that it would be uniform. There might be exceptions now and then, but in a matter of life and death I think that there would be no difficulty whatever in the Judges dealing with classes of cases in a particular way.

3667. That difficulty would be very much diminished if the alteration in the law of murder which you have mentioned was made?—Certainly.

3668. If the sentence of death could only be passed in the most flagrant cases, there would probably be very few of those cases in which the Judge would pass a sentence of penal servitude for life?—Certainly. There is one class of cases upon which I have a very strong opinion, and that is cases of lunacy. I had great experience in India under the Lunacy Act. I think it very desirable that there should be a discretionary power given to the Court in cases of murder committed by persons supposed to be of unsound mind.

3669. What would be the nature of that power?—I mean the power of transportation for life. I know that there is a very great difficulty in accurately defining unsoundness of mind; and perhaps of all the cases which come before a Judge, these cases are the most difficult. For instance, there are many persons who may have been insane for 10 or 15 years; the incubation of the disease may have lasted all that time, and perhaps some violent act on the part of the man causes people to regard it as a mere outbreak of passion, although committed under the influence of disease; the man afterwards commits murder, is convicted, sentenced, and hung. It then probably turns out that there is evidence to show hereditary insanity in the family, that he himself has had a former attack of insanity, and there is great difficulty in deciding upon the matter. I mention that because I remember a remarkable case which occurred, and which

probably Mr. Waddington will recollect, and it is the only case which I know in the history of the criminal law, where a man was tried twice for murder; it occurred upon my own circuit. I was counsel for the Crown. The man was tried for the murder of his wife. At the time when he committed that murder he took away the life of his daughter. The man was tried before the present Lord Wensleydale. I was so satisfied of the guilt of the party, that I replied upon the evidence, and the man was convicted and sentenced.

3670. Was the defence insanity?—Yes. A strong recommendation was made to the Home Office by the chaplain of the gaol, who was a very excellent man, and who took a great interest in the working of the gaol. Other parties also took the matter up, and upon Mr. Baron Parke being consulted, he reported that he was satisfied with the verdict; but the Home Office took upon itself the responsibility (and as it turned out most wisely), of having the man tried a second time on a capital charge for the murder of his daughter. The case went down and was tried before the Lord Chief Baron; additional evidence was given, and it was proved that the man was mad. The second jury found him so, and of course he was acquitted of the murder, and the man died raving mad a short time afterwards. I mention that case because it was a lesson to me, and it has made a very deep impression upon my mind, and during the time I held the office of Judge in India I experienced great difficulty in dealing with cases of insanity.

3671. (*Chairman.*) In the case to which you have alluded, was the plea of insanity set up on the first trial as well as on the second?—Yes.

3672. (*Mr. Waddington.*) It was the only defence, I suppose?—It was the only defence. The man attempted to destroy himself, and a medical witness who was not called on the first trial stated that the loss of blood occasioned by the cutting of the prisoner's own throat relieved the pressure upon the brain, and in all probability put him into the apparently sane state in which he appeared at the trial.

3673. That probably was not elicited at the first trial?—It was not put. In cases of this kind, time is everything, and where a plea of insanity is raised, although the Judge may not be satisfied with the evidence, still there may be circumstances in the case which satisfy him that although the evidence falls short of establishing that the man could not tell right from wrong, yet the Judge may entertain a strong opinion that considering the absence of an adequate motive and express malice that the prisoner's conduct indicated an unsoundness of mind. I think that Judges in such cases (I should myself) would pass the secondary sentence, in cases with evidence before them of hereditary insanity, and a disposition to insanity on the part of the prisoner, although the evidence for the prisoner, as I said before, might fail in showing that the prisoner could not comprehend the distinction between right and wrong; I am perfectly satisfied that in many cases the disease would soon develop itself, and the justice of the sentence would be shown to the public; and I am sure that whenever the plea of insanity was raised, on proper and reasonable grounds, the exercise of mercy would give no dissatisfaction to the public in cases of that kind.

3674. The same object would be accomplished now by the exercise of the discretion of the Secretary of State, where the Judge reported that although he was not dissatisfied with the verdict, he still had doubts as to the sanity of the prisoner?—I think that the working of the Home Office is not always satisfactory. I think that the public is more satisfied with the decision which the presiding Judge comes to,

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although the decision is always arrived at with great deliberation in the Home Office. The case has been tried, and then becomes the subject of discussion; one body of men entertain one view, and other men entertain another, and the matter is some time under consideration, and instead of the Judge pronouncing his opinion at once at the trial, when the whole case would be determined, an agitation is got up, and in many cases the whole thing becomes a subject of angry discussion; it was particularly so in the Townley case; I think that a discretionary power would be of great value.

3675. There was no discretionary power exercised in the Townley case?—No; I merely refer to it to show the agitation which was created.

3676. (*Mr. Justice O'Hagan.*) Am I to understand you to say that in any case where the plea of insanity is set up you would have a minor punishment?—Certainly not.

3677. Then what distinction would you make?—I think that, supposing the Judge had a discretionary power, he would exercise it in all cases which struck him as being fit cases, such as when there was evidence of hereditary insanity, former outbreaks, and so on.

3678. You do not make any difference in reality in the Judge's power in the case of insanity, and in any other case?—No.

3679. You think that that is merely an additional reason?—Yes. I think that it would quiet the public mind.

3680. (*Chairman.*) Is there any further observation which you wish to address to the Commission?—I only wish to state that I think that if the humane alterations in the Indian penal code, which I have alluded to, were carried out in the English law, it would give great satisfaction; and I can safely say, from the experience which I have had with reference to the whole of India, that I think it is one of the best codes in the world.

3681. (*Mr. Waddington.*) We have had several gentlemen before us who think that it is impossible to introduce the alterations in the Indian code into the English law, do you think that there is the slightest difficulty in it?—No. I have administered the English criminal law for three years, and I have administered the new Indian code for two years; I am certain there could not be the slightest difficulty, and I believe that the Chief Justice of Bengal entertains the same opinion. The Indian code is divested of all those common law terms which exist in many of the statutes affecting the criminal law in England, and is simple and intelligible.

3682. Do you think that there would be any difficulty in our making those alterations in our own English law without precisely adopting the same words?—Not the slightest. Of course the Commissioners will understand that I do not altogether approve of the Indian code, for instance, I do not approve of the sections as to adultery.

3683. (*Mr. Neate.*) And you do not approve of the clause with respect to grave and sudden provocation?—I think that that requires alteration. I think that it is embarrassing.

The witness withdrew.

Adjourned.

APPENDIX

CONTAINING

ANSWERS FROM FOREIGN COUNTRIES, FROM HER MAJESTY'S JUDGES, &c. &c. &c.

QUESTIONS

Sent through the Foreign Office to the following countries :—

France.	Austria.	Spain.	Sweden.
Belgium.	Saxony.	Portugal.	Nassau.
Holland.	Hanover.	Russia.	Anhalt.
Prussia.	Italy.	Switzerland.	Oldenburg.
Bavaria.	Tuscany.	Denmark.	Brunswick.
New York.	Ohio.	Columbia.	Wisconsin.
Pennsylvania.	Maine and Rhode	Indiana.	Ecuador.
Massachussetts.	Island.	Venezuela.	&c. &c.

1. What crimes, if any, are now punishable with death by the law of —— ?

2. When a person is found guilty of a capital offence, is there any power in the jury, or the court, to reduce the punishment below that of death by finding attenuating circumstances? If so, is this power frequently exercised?

3. What is the most severe punishment next to that of death by the law of ——? and in cases where the sentence of death is reduced by the finding of attenuating circumstances, or commuted by the government to such lesser punishment, is the latter invariably carried out in full? If not, to what extent is it mitigated?

4. Have there been any changes of late years in the law of —— by which certain crimes formerly capital have ceased to be so? If so, have these crimes increased, and is their increase, if any, attributed to the diminution of the punishment?

5. In what manner is the sentence of death executed, and does the execution take place in public or private?

6. In what proportion of capital convictions is the punishment of death usually reduced by the clemency of the Head of the State to some minor infliction?

ANSWERS.

FRANCE.

My Lord,

I have the honor to forward to your Excellency the answers to the six questions which you have been pleased to put to me, for the information of the Commissioners appointed in England, on capital punishment.

My Lord,

J'ai l'honneur de remettre à votre Excellence les résponses aux six questions qu'elle a bien voulu me poser comme renseignements pour la Commission de la Peine Capitale, instituée en Angleterre.

I have summed up as much as possible the provisions of the law, and avoided using such terms as were too technical.

1st Question.

"What crimes are punished by death "according to the law of France?"

Capital punishment is still applied in a great number of cases in spite of the reforms introduced into the Penal Code in 1832. The Penal Code dated from 1810.

Crimes committed a Second Time.

Whoever, having been condemned to penal servitude for life, shall commit a second crime entailing the same punishment, shall be condemned to death.

But this relapse is not applied to military condemnations. (Article 56 of the Penal Code, and law of the 28th April 1832.)

Crimes against the Outward Safety of the State.

Capital punishment is applied to the Frenchman who takes up arms against France.

The same punishment is applied to whomsoever shall have practised machinations or been in communication with foreign powers or their agents, for the purpose of persuading them to commit acts of hostility or to enter into war against France, or to procure them the means of so doing, even should such manœuvres not be followed by hostilities.

It is the same with regard to persons who shall have practised manœuvres or held communications in order to facilitate the entry of enemies into the territory; to deliver up to them towns, fortresses, arsenals, or ships; who shall have furnished them with aid, or who shall in any manner have assisted the progress of the enemy against the French armies or the allies of France acting against the enemy for a common end. (Articles 75, 76, 79 Penal Code.)

The Articles 80, 81, 82, 83 punish by death all persons who, knowing the secret of a negotiation or an expedition, shall have divulged the same to foreign powers or to the enemy, who shall have given plans of fortifications or arsenals, who shall knowingly harbour spies or soldiers sent to reconnoitre.

J'ai résumé autant que possible les dispositions de la loi et écarté les termes trop techniques.

1ere Question.

"Quels sont les crimes punis de la "peine de mort selon la loi de "France?"

La peine capitale s'applique encore à un grand nombre de cas malgré les réformes introduites dans le Code Pénal in 1832. Le Code Pénal datait de l'année 1810.

Crimes commis en récidive.

Quiconque ayant été condamné aux travaux forcés à perpétuité aura commis un second crime emportant la même peine sera condamne à la peine de mort.

Mais cette *récidive* ne s'applique point aux condamnations militaires. (Article 56 du Code Pénal et loi du 28 Avril 1832.)

Crimes contre la sureté extérieure de l'Etat.

La peine capitale frappe le Français qui aura porté les armes contre la France.

La même peine frappe quiconque aura pratiqué des machinations ou entretenu des intelligences avec les puissances étrangères ou leurs agents pour les engager à commettre des hostilités, ou à entreprendre la guerre contre la France, ou pour leur en procurer les moyens, lors même que ces manœuvres n'ont pas été suivies d'hostilités.

Il en est de même pour les personnes qui auront pratiqué des manœuvres ou entretenu des intelligences pour faciliter aux ennemis de l'état l'entrée sur le territoire; leur livrer des villes forteresses, arsenaux, navires; qui leur auront fourni des secours, ou qui auront d'une façon quelconque secondé les progrès des ennemis contre les armées Françaises, ou les alliés de la France agissant contre l'ennemi dans un but commun. (Articles 75, 76, 79 Code Pénal.)

Les Articles 80, 81, 82, 83, punissent de mort toutes personnes qui, connaissant le secret d'une négociation ou d'une expédition, l'aura livré aux puissances étrangères ou à l'ennemi; qui auront livré de plans de fortifications ou d'arsenaux . . . . . qui auront sciemment récélé des espions ou des soldats envoyés à la découverte.

Crimes against the Head of the State and his Family.

An attempt against the life or the person of the Emperor is visited with the punishment for parricides. The attempt against the life of the members of the Imperial family is visited by the same punishment of death. (Article 86.) The difference between the punishment for parricide and the punishment of death is this, that in the case of parricide the person condemned is led to the place of execution in his shirt, barefooted, and with his head covered by a black veil. He remains exposed on the scaffold whilst the crier (*huissier*) reads his sentence to the people. (Article 13 of the Penal Code.)

Crimes against the Inward Safety of the State.

The attempt to excite civil war by arming citizens against each other, to carry massacre and pillage into the communes, is punished by death. (Article 91.)

The same punishment is prescribed for those who have levied troops, armed or enrolled soldiers without the authority of the legitimate power. For those who without right shall have taken the command of an army, corps, of a fleet, of a fortress. For those who shall have retained against the orders of the Government any military command. For those commanders who shall have kept their troops together after the order for disbanding them. For those who, having the ordering of the public force, shall have employed it to prevent the levying of soldiers, if their orders have proved effectual. (Articles 92, 93, 94.)

The law prescribes the punishment of death for those who shall have destroyed edifices, arsenals, and other property of the State. For those who shall have placed themselves at the head of armed bands, or exercised any command for the purpose of pillaging public treasure and property, attacking or resisting the authorities. For those who shall have directed the organization of such bands, or knowingly provided them with arms, provisions, or instruments of crime, or who shall have been in intelligence with the chiefs of such bands. (Articles 95, 96.)

All individuals taken on the spot where such crimes are committed are liable to the punishment of death without distinction. (Article 98.)

Crimes contre le Chef de l'Etat et sa famille.

L'attentat contre la vie ou la personne de l'Empereur est puni de la peine de parricide. L'attentat contre la vie des membres de la famille impériale est puni de la même peine de mort. (Art. 86.) Il y a cette différence entre la peine du parricide et la peine de mort, c'est qui en cas de parricide le condamné est conduit sur le lieu de l'exécution en chemise sur pieds, et la tête couverte d'un voile noir. Il reste exposé sur l'échafaud pendant qu'un huissier fait au peuple lecture de l'arrêt de condamnation. (Article 13 du Code Pénal).

Crimes contre la sureté intériaires de l'Etat.

L'attentat dont le but sera d'exciter la guerre civile en armant les citoyens les uns contre les autres . . . . . de porter le massacre et le pillage dans les communes, est puni de mort. (Article 91.)

Sont punis de la même peine ceux qui ont levé des troupes, armé ou enrôlé des soldats sous autorisation du pouvoir légitime. Ceux qui sans droit auront pris le commandement d'un corps d'armée, d'une flotte, d'un fort. Ceux qui auront retenu contre l'ordre du gouvernement un commandement militaire quelconque. Ces commandants qui auront gardé leur troupe réunie, après le licenciement ordonné. Ceux qui pouvant disposer de la force publique, l'auront employée contre la levée des gens de guerre si leurs ordres ont été suivis d'effets. (Arts. 92, 93, 94.)

La loi prononce la peine capitale contre ceux qui auront détruit les édifices, arsenaux et autres propriétés de l'Etat ; contre ceux qui se seront mis à la tête des bandes armées, ou y auront exercé un commandement pour piller les deniers et propriétés publiques, pour attaquer les autorités ou leur résister ; contre ceux qui auront dirigé l'organisation de ces bandes, leur auront sciemment fourni des armes vivres, ou instrumens de crimes, ou qui aurout eu des intelligences avec les chefs de ces bandes. (Arts. 95, 96.)

Tous les individus pris sur les lieux de l'exécution de ces crimes sont indistinctement punissables de mort. (Art. 98.)

Capital punishment is also pronounced against those depositaries of public authority who may have concerted to plot an attempt against the internal safety of the State. (Article 125.)

Blows or wounds inflicted on the agents of authority in the exercise of their duties with the intention of causing death are punished by capital punishment. (Article 233 of the Penal Code.)

The law distinguishes between murder (*le meurtre*) and assassination (*l'assassinat*). Murder is homicide committed wilfully. Assassination is murder committed with premeditation and preparation.

Parricide, assassination, infanticide, and poisoning are punished by death. All malefactors of whatever denomination who, in the execution of their crimes, employ torture or commit acts of barbarity are considered assassins.

Simple murder or homicide without premeditation or preparation is only punishable by penal servitude for life, but it entails the punishment of death when it is preceded, accompanied, or followed by another crime, or when its object has been to prepare, facilitate, or execute a crime either to favour the escape or to assure the impunity of the authors or accomplices of such crime. (Articles 302, 303, 304, of the Penal Code.)

If these crimes have been committed by a seditious body with rebellion or pillage, they are imputed to the chiefs and instigators and those who have personally committed them. (Article 313.)

The punishment of death is pronounced against the crime of castration if it causes the death of the victim within 40 days. (Article 316.)

It is also awarded for the crime of "sequestration" if the delinquents have subjected their victims to bodily torture. (Article 344.)

Lastly, false witnesses and the suborners of false evidence who have caused an innocent person to be condemned to death undergo the same penalty. (Article 361.)

Incendiaries, when the places are inhabited or serve as dwellings, are punished by death, even when the places belong to themselves. Setting

La peine capitale est encore prononcée contre les dépositaires de l'autorité publique qui se servient concerté, pour un complot attentatoire à la sûreté intérieure de l'Etat. (Art. 125.)

Crimes contre les Personnes.

Les coups portés ou les blessures faites aux agens de l'autorité dans l'exercise de leurs fonctions, avec intention de donner la mort, sont punis de la peine capitale. (Art. 233 du Code Pénal.)

La loi distingue entre le meurtre et l'assassinat, le meurtre est l'homicide commis volontairement; l'assassinat est le meurtre commis avec préméditation ou avec guet-à-pens.

Le parricide, l'assassinat, l'infanticide, et l'empoisonment sont punis de la peine de mort. On considère comme assassins tous les malfaiteurs, quelle que soit leur dénomination, qui pour l'exécution de leurs crimes emploient des tortures ou commettent des actes de barbarie.

Le meurtre simple ou l'homicide sans préméditation ni guet-à-pens n'est possible que des travaux forcés à perpétuité; mais il emporte la peine de mort quand il a été précédé, accompagné, ou suivi d'un autre crime, ou bien quand il aura eu pour objet soit de préparer, faciliter, ou exécuter un délit, soit de favoriser la faite ou d'assurer l'impunité des auteurs ou complices de ce délit. (Arts. 302, 303, 304 du Code Pénal.)

Si ces crimes ont été commis en réunion séditieuse avec rébellion ou pillage, ils sont imputables aux chefs et instigateurs, et ceux qui les ont personnellement commis. (Art. 313.)

La peine de mort est prononcée contre le crime de castration, si la victime en est morte dans le délai de 40 jours. (Art. 316.)

Elle existe aussi pour le crime de séquestration, si les coupables ont soumis leurs victimes à des tortures corporelles. (Art. 344.)

Enfin, les faux témoins et les suborneurs de faux témoignages qui ont fait condamner à mort un innocent, subissent la même peine. (Art. 361.)

Crimes contre les Propriétés.

Les incendiaires, quand les lieux sont habités ou servent à l'habitation, sont punis de mort, lors même pu les lieux leur appartiendraient. Le feu

fire purposely to places not used as dwellings is only punishable by penal servitude for life; but if the fire should cause the death of any one the punishment is death. It is the same with regard to those who destroy edifices in any manner whatever, should homicide take place. (Articles 434, 435, 437, Penal Code.)

Such is an enumeration of the cases in which the punishment of death is applicable according to the law of France. This law, in many of its provisions, bears the stamp of those times of military and revolutionary agitation in which it was produced and exercised.

2nd Question.

" When a person has been declared
" guilty of a capital offence, has
" the jury or the court, on the
" admission of extenuating cir-
" cumstances, the power of re-
" ducing the punishment to a
" lesser penalty than that of
" death? and if so, is this power
" often exercised?

The jury before entering the chamber where they deliberate, are advised by the President of the Court to examine and declare whether there are extenuating circumstances in favour of the accused.

If the jury in their verdict declare that there are extenuating circumstances in favour of the accused, the Court is *obliged* to lower the penalty by one degree at least; and it *may*, if it considers it necessary, lower it two degrees. Thus, it is lawful for the court to inflict penal servitude for life, or for a period the limits of which are from five to twenty years. When crimes against the safety of the State are in question, transportation or detention replace penal servitude for life or penal servitude for a period. (Art. 463.)

The jury freely admit extenuating circumstances. Criminal statistics for the last thirty years give the most exact figures on this subject. Extenuation affects more than seven-eighths of the cases of capital convictions.*

The law forbids the rendering an account of the private deliberations of the jury; and, in general, the motives

* I will give, lower down, some figures from the Criminal Statistics.

mis volontairement à des lieux ne servant pas à l'habitation n'est possible que des travaux forcés à perpétuité; mais si l'incendie a causé la mort de quelqu'un, la peine est la mort. Il en est de même pour ceux qui se livrent à la destruction des édifices de quelque manière que ce soit, s'il y a en homicide. (Arts. 434, 435, 437 Code Pénal.)

Telle est l'énumération des cas où la peine de mort est applicable selon la loi de France. Cette loi, dans beaucoup de ses dispositions, porte l'empreinte des temps d'agitation militaire et révolutionnaire au milieu des quels elle est née et a fonctionné.

2e Question.

" Quand une personne a été déclarée
" coupable d'un crime capital, le
" jury ou la Cours ont-ils le pou-
" voir, par l'admission de circon-
" stances atténuantes, de réduire
" le châtiment au dessous de la
" peine de mort?—S'il en est
" ainsi, use-t-on souvent de ce
" pouvoir?"

Avant de se rendre dans la chambre de ses délibérations le jury est averti par le Président de la Cour, qu'il devra examiner et déclarer s'il y a des circonstances atténuantes en faveur des accusés.

Si le jury dans son verdict déclare qu'il existe en faveur des accusés des circonstances atténuantes, la Cour est *obligée* d'abaisser la peine d'un degré au moins; et elle *peut*, si elle le juge à propos, l'abaisser de deux degrés. Ainsi il est loisible à la Cour d'appliquer les travaux forcés à perpétuité ou les travaux forcés à temps, dont les limites sont de cinq à vingt ans. Quand il s'agit de crimes contre la sûreté de l'état, la transportation ou la détention remplacent les travaux forcés à perpétuité et les travaux forcés à temps. (Art. 463.)

Le jury use largement de l'admission des circonstances atténuantes; les statistiques criminelles donnent à cet égard depuis trente années les chiffres les plus exacts; l'atténuation porte sur plus de $\frac{7}{8}$ des cas de condamnation capitale.*

La loi défend de rendre compte des déliberations intérieurs du jury, et généralement l'on ne doit point savoir

* Je donnerai plus bas quelques chiffres tirés des statistiques criminelles.

which have caused the admission of extenuating circumstances ought not to be known; nevertheless, I do not hesitate to affirm that in a pretty large number of cases it has been manifest that the verdict of the jury has been inspired by the antipathy of the jurymen to capital punishment. One of the most memorable cases was the spectacle presented, scarcely three months ago, by the Court of Assizes of the Haut Rhin sitting at Colmar. The case was that of a parricide. The crime had been accompanied by the most aggravating circumstances, it was evident, and it was proved. The only defence that could be pleaded was illegitimacy and the *uselessness* of the punishment of death. The question was met on this point by the Procureur General, who had personally undertaken the accusation. After earnest contradictory pleadings, the jury delivered a verdict with extenuating circumstances.*

This verdict is in accordance with numerous petitions now being signed for the abolition of the punishment of death, and which will, probably, soon be the object of serious discussion in the Senate.

Nevertheless, the majority of minds appears to be far from united in this opinion, and if the law can enumerate a certain number of crimes committed by individuals at the very moment they were present at an execution, may not the retort be made that it is impossible to know the number of crimes which have been prevented by the execution of capital punishments?

3d Question.

" What penalty, in France, is the
" most severe, next to the pun-
" ishment of death—and, in the
" case where capital punishment
" has been set aside by the ad-
" mission of extenuating circum-
" stances or the commutation of
" the punishment by the Sove-
" reign, is the penalty invariably
" undergone until its termina-
" tion? If not, within what limits
" is it mitigated?"

The most severe punishment next to that of death is that of penal servitude for life, and, for crimes against

* Some years ago there were in the Bagne of Brest 14 convicts condemned for parricide.

les motifs qui ont fait admettre les circonstances atténuantes; cependant je ne crains pas d'affirmer qu'il est un assez grand nombre de cas où il a été *manifeste* que le verdict du jury a été inspiré par son antipathie contre la peine de mort; en des cas les plus mémorables, c'est le spectacle qu'a présenté, il y a trois mois à peine, la Cour d'Assizes du département du Haut Rhin siégant à Colmar. Il s'agissait d'un parricide; le crime avait été accompagné des circonstances les plus aggravantes; il été patent, avéré, la défense n'avait qu'à plaider que l'illégitimité et *l'inutilité* de la peine de mort. Le débat avait été accepté sur ce point par le Procureur Général, qui s'était chargé personnellement de l'accusation. Après de vives plaidoiries contradictoires, le jury a rapporté un verdict de circonstances atténuantes.*

Ce verdict concorde avec de nombreuses pétitions qui se signent en ce moment pour l'abolition de la peine de mort, et qui seront probablement bientôt l'objet d'une discussion solennelle au Sénat.

Cependant la majorité des esprits semble loin d'être rallié à cette opinion, et si la loi compte un certain nombre de crimes commis par des individus au moment même où ils venaient d'assister à une exécution capitale, ne peut-on pas rétorquer l'argument, en disant que l'on ne sait certes point le nombre de crimes qui ont été empêchés par l'exécution des peines capitales.

3e Question.

" Quelle est en France la peine la plus
" sévère après la peine de mort, et
" dans le cas ou la peine capitale a
" été écartée par l'admission des
" circonstances attenuantes ou la
" commutation de peine par le
" Souverain, le châtiment est-il
" invariablement subi jusqu'à la
" fin? S'il n'en est pas ainsi,
" dans quelles limites est il mi-
" tigé?"

La peine la plus sévère après la mort est celle des travaux forcés à perpétuité, et pour les crimes contre

* Il y a quelques années, où complait au Bagne de Brest 14 forçats condamnés pour parricide.

the safety of the State, that of transportation.

As to the duration of these penalties, they are not invariably borne till the end; no limit is imposed on the Government which may modify or abridge them. From the moment that the condemnation has become definitive, the condemned no longer belong to justice, but to the administration of the Minister of the Interior, who causes the penalty to be inflicted in conformity with rules which he has laid down. Thus, it is not customary for the directors of penitentiary establishments to present, on their annual reports, for commutation, abridgement, or pardon any but *repentant* criminals who have undergone the half of their punishment. But this rule is not without numerous exceptions. In a word, the absolute right of pardon, belonging to the sovereign, allows the administration to act as it thinks fit.

According to the law of the 1st of June 1854, on the execution of the punishment of forced labour in the Colonies, the pardoned may even be authorized to return to France by virtue of a special disposition of the letters of pardon.

4th Question.

" Have there been of late years in
" France changes by which
" crimes previously punished by
" capital punishment have only
" been visited by milder penal-
" ties? And, should the answer
" be in the affirmative, have
" these crimes increased, and is
" this increase attributed to
" the diminution of the punish-
" ment?"

The Penal Code of 1810 was not the object of any serious or extensive reform until 1832. (Law of the 28th April 1832). This reform, among other ameliorations, such as the introduction of the system of extenuating circumstances, has substituted the punishment of penal servitude for life for that of death for certain criminals, as for instance those who conceal robberies, when the principals were by reason of aggravating circumstances punished by death, (Ancient Articles 63 and 381); forgers and coiners, (Ancient Articles 132, 139, 304, 310); murderers without aggravating circumstances, (Ancient Articles 198, 231, 304, 310); those guilty of rape,

la sûreté de l'état celle de la déportation.

Quant à la durée de ces peines, elles ne sont pas invariablement subies jusqu'à la fin, aucune limite n'est imposée au Gouvernement qui peut les modifier et les abréger. Du moment que la condamnation est devenue définitive, les condamnés n'appartiennent plus à la justice, mais à l'administration du Ministre de l'Intérieur; celui-ci fait exécuter la peine conformément à des règlemens qu'il a faits; ainsi il est d'usage que les directeurs des établissemens pénitentiaires ne doivent présenter sur leurs états annuels de commutation ou d'abréviation, ou de grâce de la peine, que les condamnés *répentis* et qui ont subi la moitié de leur châtiment; mais cette règle n'est pas sans de nombreuses exceptions; en un mot, le droit absolu de grâce qui appartient au Souverain permet à l'administration d'agir comme elle le juge utile. D'apres la loi du 1 Juin 1854, sur l'exécution de la peine des travaux forcés dans les colonies, les graciés peuvent même être autorisés à rentrer en France en vertu d'une disposition spéciale des lettres de grâce.

4e Question.

" Y'a-t-il eu dans ces dernières années
" en France des changemens par
" lesquel des crimes frappés an-
" térieurement de la peine capitale
" n'ont plus été punis que de
" peines moins fortes? En cas
" d'affirmative ces crimes ont ils
" augmentés, et cette augmen-
" tation est elle attribuée à la
" diminution du châtiment?"

Le code pénal de 1810 n'a été l'objet d'une réforme serieuse et considérable qu'en 1832 (Loi du 28 Avril 1832). Cette réforme entre autres améliorations, telle que l'introduction du système des circonstances atténuantes, a substitué à la peine de mort celle des travaux forcés à perpetuité pour certains criminels, tels que les receleurs des vols, alors que les auteurs principaux étaient, en raison des circonstances aggravantes, punis de mort (anciens articles 63 et 381), les faussaires et les faux monnayeurs (anciens articles 132, 139, 304, 310), les meurtriers sans circonstances aggravantes (anciens articles 198, 231, 304, 310), les coupables de viol (ancien article

(Ancient Article 333); incendiaries under certain aggravating circumstances specified by the law, (Ancient Articles 434 and 435). This diminution of punishment has by no means caused the number of crimes to increase, as is proved by the criminal statistics annually published in France, where crime is on the decrease. This result may in a great measure be attributed to the fact that liberated convicts are forbidden to dwell in France after the expiration of their penalty.

5th Question.

"In what manner are capital sentences executed? Does the execution take place in public or in a place set apart?"

Condemned persons are decapitated by means of a machine popularly called the Guillotine, from the name of its inventor, Dr. Guillotine, a member of the National Convention in 1792.

The scaffold is erected in the public square of the town where the Court of Assizes sits, and sometimes, if the sentence prescribes it, of the place where the crime was committed. The execution takes place before the crowd, who, sad to say, never appear to be much affected by the sight of blood.

6th Question.

"According to what proportion does the Sovereign exercise his mercy in the commutation of capital punishment into lesser penalties?"

The executions average about half the number of sentences to death. They have reached in late years to about twenty every year. Further on I will give some exact figures.

Whether the convict has or has not sued for pardon or commutation of penalty, the case is always examined by a commission at the Ministry of Justice, and by the advice of this commission the execution either takes place or the penalty is commuted, unless the Emperor should take the initiative; his right of pardon has no limit.

Such, my Lord, are the replies (to the questions) which your Excellency has had put to me; they are succinct, but substantial. I could give them any development that might be re-

333), les incendiaires sans des circonstances aggravantes specifiées par la loi (anciens articles 434 et 435).

Cette diminution dans les châtimens n'a nullement fait augmenter le nombre de ces crimes, ainsi que le prouvent les statistiques criminelles, publiées annuellement en France, où la criminalité tend à diminuer; il faut attribuer en grande partie ce résultat à l'interdiction pour les forçats libérés de séjourner en France après l'expiration de leur peine.

5e Question.

"De quelle manière execut-e-t-on les sentences capitales? L'execution-t-elle lieu sur la place publique ou dans un lieu réservé?"

Les condamnés ont la tête tranchée du moyennant d'une machine, appelée populairemens la guillotine, du nom de son inventeur le Docteur Guillotin, membre de la Convention Nationale en 1792.

On dresse l'échafaud sur la place publique de la ville où siège la cour d'assises, et quelquefois, si l'arrêt de condamnation le prescrit, du lieu où le crime a été commis. L'exécution a lieu devant la foule que la vue du sang ne semble jamais beaucoup impressionner, c'est triste à dire.

6e Question.

"Dans quelle proportion le Souverain exerce-t-il sa clémence pour la commutation des peines capitales en un châtiment moindre?"

Les exécutions à mort sont en moyenne de la moitié des condamnations prononcées. Elles se sont élevées dans ces dernières années à environ 20 chaque année. Puis loin je donnerai quelques chiffres exacts.

Que le condamné se soit ou non pourvu en grâce ou commutation de sa peine, l'affaire est toujours examinée par une commission au Ministère de la Justice, et c'est sur l'avis de cette commission qu'il est donné suite soit à l'exécution soit à la commutation de la peine; à moins que l'Empereur n'use de son initiative; son droit de grace n'a aucune limite.

Telles sont, my Lord, les reponses (aux questions?) que V.E. m'a fait poser; elles sont succinctes mais substantielles. Je suis à même de leur donner tous les développemens qu'on

quired, or answer any other questions on the same subject.

Accept, my Lord, my profound and respectful devotion.

N. TRIETE,
Avocat à la Cour Impériale ;
Counsel to the British Embassy.

Sept. 9, 1864.

demanderait et de résoudre toutes autres questions se rattachant au sujet.

Agréez, my Lord, mon profond et respectueux dévouement,

N. TREITE,
Avocat à la Cour Impériale,
Conseil à l'Ambassade Anglaise.

Ce 9 Septembre, 1864.

Years.	Verdicts of Capital Punishment mitigated by Extenuating Circumstances.	Sentences of Death without Extenuating Circumstances.
1859	305	36
1860	292	39
1861	301	26
1862	330	39

Années.	Verdicts de Peine Capitale mais mitigés par les Circonstances Atténuante.	Verdicts à Mort sans Circonstances Atténuantes.
1859	305	36
1860	292	39
1861	301	26
1862	330	39

In 1859 there were—
21 executions in France.
15 commutations into penal servitude for life.

36

1860. The work is compiled for ten years with regard to the statistics, and does not give the yearly results.

1861. 12 executions.
13 commutations into penal servitude for life.
1 commutation into perpetual imprisonment.

26

1862. 25 executions.
10 commutations into penal servitude for life.
2 suicides.
2 perpetual imprisonment.

39

I think it would be useful for the Commission to consult the French Criminal Statistics. They should have been sent to Her Majesty's Government. But in any case your Excellency has but to ask for them from the Ministry of Justice, where there are several collections.

N. T.

En 1859 il y a eu—
21 exécutions en France.
15 commutations en travaux forcés à perpetuité.

36

1860. Le travail est fait pour dix ans dans la statistique et ne donne pas le résultat annuel.

1861. 12 exécutions.
13 commutations en travaux forcés à perpétuité.
1 commutation en réclusion perpétuelle.

26

1862. 25 exécutions.
10 commutations à travaux forcés à perpétuite.
2 suicides.
2 réclusions perpétuelles.

39

Il me parait utile que la Commission consulte les statistiques criminelles françaises. Elles doivent avoir été envoyées au Gouvernement de la Reine ; mais en tous cas V. E. n'aurait qu'à les demander au Ministère de la Justice, où il y en a plusieurs collections.

N. T.

BELGIUM.

ANSWERS to QUERIES with reference to Capital Punishment in Belgium.

1st. The crimes punishable with death are:—Bearing arms (by a Belgian) against his own country.—Machinations with a Foreign Government against his own country.—Treachery of functionaries in time of war.—Harbouring spies of an enemy.—Attempt to destroy or change the Government, or cause civil war, &c. —Assaulting with attempt to murder a public functionary in the exercise of his duties.—Coining.—Forgery of notes of a bank recognized by law.—Assassination (wilful and premeditated murder).—Parricide.—Infanticide.—Poisoning.—Manslaughter (wilful homicide, "meurtre") when preceded, accompanied or followed by another crime.—Castration, followed by death.—Illegal incarceration accompanied by the infliction of bodily tortures.—Perjury in a criminal cause, when the accused is condemned to death.—Subornation to perjury with the above reserve.—Arson attended with loss of life.—Wilful destruction of buildings, ships, bridges, attended with loss of life.—If any one condemned to perpetual forced labour commits a second crime visited with the same penalty, he is condemned to death.

2ndly. Neither the jury nor the court have the power of finding extenuating circumstances, though the royal prerogative of clemency may be invoked by the judge in submitting the sentence for the confirmation of the Sovereign.

3rdly. Forced labour for life. In cases of commutation of capital sentences this is not necessarily, or indeed generally, pronounced, still less carried out in full.

4thly. No material changes since 1835. The proposed new penal code, which has passed the Chamber of Representatives, will materially reduce the number of crimes punished with death.

5thly. By the guillotine in public.

6thly. Only about 7 per cent. of the capital sentences are executed. The number of these sentences pronounced from 1830 to the end of 1863 was 819. The number executed 57.

Brussels, Sept. 12, 1864.

HOLLAND.

1. THE following articles of the French Penal Code of 1810, introduced into the Netherlands in 1811, imposing the penalty of death, are still in force there; namely, Articles 75, 76, 77, 79, 80, 81, 82 first clause, 83, 86, 87, 91, 92, 93, 94 second clause, 95, 96, 97, 125, 182 (in case the act of bribery has for its consequence a sentence of death), 203 and 206 (in case the sermons and writings referred to in those articles lead to an insurrection punishable with death), 231, 233, 302 (so far as relates to murder and parricide), 303, 316, 344, 361 (in case the perjury has a sentence of capital punishment for its consequence), 365, 381 and 437 second clause.

Besides these, capital punishment is further imposed by various Articles of the Ordinance of the Administration of the Bavarian Republic, dated 10th January 1805, on offences against the quarantine regulations enacted by that Ordinance; as well as in Art. 36 of the law of 14th March 1819 (Staatsblad, No. 12), on those who transfer the Turkish passports (Mediterranean passes) to foreigners by purchase, loan, exchange, or any other title, or on those who forge or counterfeit such passports.

2. Where capital punishment is imposed, the court (there is no jury in the Netherlands) is in no case competent to pass any other sentence on the ground of extenuating circumstances.

3. The next punishment to death is hard labour for not less than five or more than twenty years. In granting pardon the King is entirely at liberty to impose the above-mentioned punishment, or a more mitigated one, or no punishment at all, in commutation of the capital penalty pronounced by the judge. In general, however, whenever remission of capital punishment is granted by way pardon, such punishment is commuted for hard labour for a term varying according to the nature and circumstances of the offence committed.

4. By the law of 24th April 1836 (Staatsblad, No. 13), the penalty of death annexed by Article 132 of the Penal Code to the offence of false coining, as far

as relates to gold and silver coin, is changed to the punishment next inferior to that of death. That merciful provision is, however, by Article 6 of the law in question, declared inapplicable to masters of the mint and other officers and workmen employed in the royal mint.

The substitution of secondary penalties (hard labour for not less than five or more than 20 years) for that of death, is made applicable on a more extended scale by Article 13 of the law of 29th June 1854 (Staatsblad No. 102) in which they are prescribed for the following offences :—

(1.) False coining, as far as relates to gold and silver coin, by whomsoever committed. (Article 132 Penal Code.)

(2.) Forgery, as described in Article 139 of the Penal Code.

(3.) Homicide, preceded, attended, or followed by any other crime (Fr. *crime*) or misdemeanor (*délit*), unless the object of the homicide was to prepare or facilitate the means of committing such crime or misdemeanor, or to prevent the discovery of it (thus altering Article 304 of the Penal Code).

(4.) Infanticide committed for the first time by an unmarried mother (altering Article 302 of the Penal Code).

(5.) Arson, as defined in Articles 434 and 435 of the Penal Code, when there was no reason to suppose that life would be endangered by the act.

Finally, Articles 56, 57, and 58 of the Penal Code are repealed by Article 11 of the same law, with the following effect, that the penalty of death can in no case be annexed to the repetition of an offence (*récidive*) where such penalty is not imposed upon such second offence (*le second crime*) on its own account.

In general it does not appear that the number of offences formerly punishable with death has increased since a more mitigated penalty has been annexed to them, and if that should be the case with some, yet there is no proof that the cause of such temporary increase is to be ascribed to the mitigation of penalties.

5. Capital sentences are executed in public on a scaffold, by fastening the criminal by a rope round his neck to a gallows, and opening a trap door under his feet.

Articles 13 and 14 of the French Penal Code have been repealed in the Netherlands, the former in 1813, and the latter in 1854.

6. The proportion of executions to sentences not executed in consequence of pardon granted, is shown by the following statistical return, from 1811 to 1861 inclusive :—

Description of Offences.	1811–1820.		1821–1830		1831–1840.		1841–1850.		1851–1861.		Total of the 51 Years.	
	Executed.	Not Executed.	Executed.	Not Executed.	Executed.	Not Executed.	Executed.	Not Executed.	Executed.	Not Executed.	Executed.	Not Executed.
Infanticide - -	2	6	1	8	–	10	–	9	–	9	3	42
Homicide - -	3	2	5	1	1	3	2	8	3	2	14	16
Murder - - -	22	14	13	5	8	15	3	13	3	15	49	62
Poisoning - -	8	2	1	2	3	–	1	1	–	6	13	11
Parricide - -	1	–	–	–	2	1	–	2	–	1	3	4
Matricide - -	–	–	–	–	–	–	–	–	–	1	–	1
Arson - - -	1	4	1	10	–	14	–	35	1	28	3	91
Robbery with aggravated circumstances.	5	7	3	14	2	7	4	33	2	12	16	73
False Coining - -	–	4	–	9	–	6	–	4	–	1	–	24
Assaulting and Wounding Public Officers.	–	–	–	1	–	1	–	–	–	2	–	4
Insurrection in Arms against the State.	–	–	–	–	1	–	–	–	–	–	1	–
	42	39	24	50	17	57	10	105	9	77	102	328
	81		74		74		115		86		430	

PRUSSIA.

Answer 1.

The Penal Code of Prussia of the 14th of April 1851, threatens with capital punishment—

1. The crime of high treason (f. 66, r. r. C.)
2. That of treason to the country (f. 67 and f. 69).
3. Violence to the king's person (f. 74).
4. Murder (f. 175).
5. Wilful slaying while committing a crime, in order to set aside an obstacle which may present itself to the carrying out thereof (f. 178).
6. Manslaughter of a blood relation in the *senior* (aufsteigender) branch (p. 179).
7. Incendiarism, if a man's life be lost owing to the fire (p. 285).
8. Inundation wilfully brought about, if human life is lost thereby (p. 290).
9. Wilful damaging of railroads, of their rolling stock, or other things belonging to railroads, if human life be lost thereby (p. 294).
10. Wilful damaging of lights intended for the safety of ships, if thereby a ship be wrecked and human life lost (p. 302).
11. A wreck wilfully occasioned, or scuttling of a ship, if human life be lost thereby (p. 303).
12. Wilful poisoning of wells, water cisterns, or public sale of forbidden articles, when human life is lost thereby (p. 304).

Besides, these crimes punishable with death according to the Common Penal Code, are those which come under the Penal Code for the Army.

a. For treason in war (s. 88).
b. Repeated desertion in time of war (s. 99).
c. Instigation to a plot for desertion in time of war (s. 102).
d. Flight from the enemy out of cowardice (s. 117 and 119).
e. Active opposition, and attempted attack with arms, except under aggravated circumstances (s. 128).
f. Excitation in time of war (s. 135).
g. Meeting in the proximity of the enemy, either with armed hand or with violence against superior (s. 141).
h. Pillage in complicity (s. 149).

Answer 2.

(*a*.) According to the Penal Code the attempt at crime shall be punished like the crime itself, in crimes which are punishable with death; the attempt, however, shall not be punishable with death, but only for a period not less than 10 years (s. 32 of the Penal Code).

(*b*.) A participator also in a crime shall be punished like the principal. If, however, it is proved that the participation was done unwittingly, imprisonment for a period of not less than six years shall be inflicted instead of capital punishment.

(*c*.) A person who has not completed his sixteenth year, having power of discernment, found guilty of committing a crime which is punishable with death, shall not be punished with death, but with imprisonment for from 3 to 15 years (s. 43).

(*d*.) An act of violence against the king's person, when the case is not so serious as was first expected, or when it is proved that extenuating circumstances exist, shall be punished with imprisonment for from 10 to 20 years, instead of with death.

Neither the jury nor the court of justice, can in other cases than those here mentioned, and those seen in the supplement, select milder punishments for those punishable with death. The second portion, therefore, of the question is disposed of.

Answer 3.

The punishment next to that of death is imprisonment for life (s. 176, 290, 301, 233).

If a crime, which in itself is punishable with death is punished with imprisonment (Freiheitstrafe), instead of with death for reasons set forth in the Question 2. the Penal Code itself states what temporary punishment is to be inflicted.

If, however, the sentence of capital punishment is reduced by the clemency of the Government, *i.e.* by the king, the king is in no way restricted as to the reduction; but he can, in his absolute judgment (Ermessen), commute it to whatsoever punishment he pleases.

In the generality of cases a sentence of death when reduced in consequence of the king's grace and commuted to imprisonment, is replaced by imprisonment for life, and this punishment is generally according to rule carried out to its full extent.

This rule admits, however, as stated, of exceptions, when either there are reasons in the person of the criminal, or in the circumstances of the deed, which may induce the king to grant a further extension of his grace.

Moreover, no sentence of death can according to Prussian law, be carried out before the king's approbation has been given. (If. 11, Tit. 13, p. 8.)

The mode of proceeding therein is as follows:—When a sentence of death has been confirmed by law, the first court of justice, prepares the case for presentation to the minister of justice.

The minister of justice examines the case on the basis of the proceedings *laid before him* (eingenthu), and forms thereon a comprehensive written report for his Majesty.

The case is next in assembled council verbally laid before the king by the minister of justice, and on the basis of this representation, and of the counsels attached thereto, the king comes to a decision, as to whether he will exercise mercy, or whether justice shall take its course, and such a decision having been arrived at by the king, and the order having been countersigned by the minister of justice, the penalty of death is carried out.

Answer 4.

The penal law of Prussia was up to the year 1851 contained in the second portion, 20 Titel, of the common law for the states of Prussia of February 5, 1794. It was revised in the often mentioned Penal Code of the 14th of April 1851, and then reduction of capital punishment was introduced. The then law of the land punished with death—

1. Duelling, if one of the parties was killed (s. 171. vol. 11. tit. 20).
2. Manslaughter, that is slaying without premeditation, with a hostile intent however; wounding another in such a way as would in the ordinary course of things lead to death (p. 806, *a*).
3. Murders wilfully occasioned (p. 801).
4. Intentional slaying of a new born illegitimate child by its mother at, or after its birth (s. 965–967).
5. Exposure of a child, when death comes in consequence (s. 969).
6. Robbery, when the person robbed died in consequence of ill-usage (p. 1191, 1192).
7. Highway robbery, when bodily violence was sustained by the plundered (1199).
8. Thieving, carried on by enrolled bands (p. 1210, 1216).
9. He who maliciously causes a scarcity of the necessaries of life, in consequence of which a tumult arises and human life is lost (p. 1502).
10. Intentional causing of an inundation though there be no loss of human life (p. 1571).

Though the Penal Code does not punish the above cases with death, there has been a marked increase in the said crimes since the milder forms of punishment have come into existence.

Answer 5.

Punishment of death is inflicted by decapitation. The executioner performs his office with the sword, and only in the Rhine Provinces is the guillotine in use.

The execution is carried out in an enclosed space or in a yard within the prison walls, or in some other closed space. Two members at least of the first court of instance must be present during the execution, one official of the office of the Attorney-General, a clerk of a court, and a high prison official.

Before the execution, information is given to the magistrate of the parish in which it is to take place. Twelve persons, officials in the parish or chosen from respectable members of the parish must be selected by the magistrate to attend at the execution. Moreover a priest of the same creed as the condemned is permitted to attend.

The attendance of the pleader for the accused and for other persons is specially permitted.

The carrying out of the sentence of death is made known by the tolling of a bell, which continues to toll until the conclusion of the execution.

Up to the year 1851, executions were carried out in public, generally in an open space before the town gates and in the presence of a vast concourse of people, and the Penal Code of the year 1851, first introduced the above mentioned "intra muros" execution.

Answer 6.

The enclosure contains a statement of criminals condemned and executed in the years 1833–1862, and also of capital sentences which through the clemency of the head of the state have been commuted to imprisonment, and it is shown by this statement that the proportion (as required in the question) between sentences of death carried into effect and those which have been commuted, is as has been answered to Question 3, mostly in favour of punishments for life.

Year.	Number of Sentences of Death.									Of which were confirmed and carried into effect.									Were pardoned.									Remarks.
	Treason and High Treason.	Robbery with Murder.	Murder.	Homicide.	Child Murder.	Arson.	Highway Robbery.	Qualified Theft.	Total.	Treason and High Treason.	Robbery with Murder.	Murder.	Homicide.	Child Murder.	Arson.	Highway Robbery.	Qualified Theft.	Total.	Treason and High Treason.	Robbery with Murder.	Murder.	Homicide.	Child Murder.	Arson.	Highway Robbery.	Qualified Theft.	Total.	
1838	.	6	4	3	1	3	.	.	17	.	5	1	1	.	.	.	.	7	.	.	3	2	1	3	.	.	9	Of the criminals condemned to death: 15 died before. 7 died after the conviction. But, before the sentence was carried into effect,— 12 criminals escaped; consequently the sentence could not be carried into effect, and in one instance, in 1862, the royal sanction was not given. Total, 35 cases, included— 7 High treason and treason. 6 Robbery with murder. 16 Murder. 2 Manslaughter. 1 Infanticide. 2 Arson. 1 Highway robbery.
1839	.	4	11	3	3	3	.	.	24	.	2	6	.	.	.	.	.	8	.	2	5	3	3	3	.	.	16	
1840	.	3	6	4	6	4	.	.	23	.	2	3	.	.	.	.	.	5	.	1	3	4	6	4	.	.	18	
1841	.	1	4	3	3	3	.	.	14	.	1	.	1	.	.	.	.	2	.	.	4	2	3	3	.	.	12	
1842	.	7	10	3	8	7	.	4	39	.	3	5	.	.	.	.	.	8	.	4	5	3	8	7	.	4	31	
1843	.	1	9	4	6	7	.	2	29	.	1	4	.	.	.	.	.	5	.	.	5	4	6	7	.	2	24	
1844	1	2	12	4	4	2	.	.	25	1	1	8	.	.	.	.	.	10	.	1	4	3	3	2	.	.	14	
1845	.	5	13	1	5	3	.	.	27	.	3	4	.	.	.	.	.	7	.	2	8	1	5	2	.	.	18	
1846	.	2	11	1	4	4	.	1	23	.	1	5	.	.	.	.	.	6	.	1	6	1	4	4	.	1	17	
1847	.	3	13	5	3	1	2	1	28	.	2	5	.	.	.	.	.	7	.	1	8	5	3	1	2	1	21	
1848	.	7	8	5	3	3	.	.	26	.	1	.	.	.	.	.	.	1	.	6	8	5	3	3	.	.	25	
1849	.	2	11	5	6	.	.	2	26	.	2	5	.	.	.	.	.	7	.	.	6	5	6	.	.	2	19	
1850	5	4	16	11	5	.	.	.	41	.	4	9	2	.	.	.	.	15	2	.	7	9	5	.	.	.	23	
1851	5	16	18	6	8	4	3	.	60	.	8	12	.	1	.	.	.	20	1	8	5	6	8	4	2	.	34	
1852	1	9	22	1	7	.	.	.	40	.	3	13	1	2	.	.	.	19	1	3	8	.	5	.	.	.	17	
1853	.	2	37	.	.	1	.	.	40	.	2	28	.	.	1	.	.	31	.	.	8	.	.	.	.	.	8	
1854	.	.	30	7	.	.	.	.	37	.	.	23	5	.	.	.	.	28	.	.	5	1	.	.	.	.	6	
1855	.	8	33	3	.	1	.	.	45	.	5	20	3	.	.	.	.	28	.	2	11	.	.	.	.	.	13	
1856	.	5	27	3	.	1	.	.	36	.	4	19	3	.	.	.	.	26	.	1	7	.	.	1	.	.	9	
1857	.	2	31	3	.	6	.	.	42	.	.	12	2	.	.	.	.	14	.	1	19	1	.	6	.	.	27	
1858	.	2	26	6	.	4	.	.	38	.	.	3	1	.	.	.	.	4	.	2	21	4	.	4	.	.	31	
1859	.	3	21	1	.	.	.	.	25	.	2	2	.	.	.	.	.	4	.	1	18	1	.	.	.	.	20	
1860	.	.	20	2	.	2	.	.	24	.	.	2	.	.	.	.	.	2	.	.	17	2	.	2	.	.	21	
1861	.	.	32	4	.	1	.	.	37	.	.	4	1	.	.	.	.	5	.	.	26	3	.	1	.	.	30	
1862	.	2	28	1	.	1	.	.	32	.	1	2	.	.	.	.	.	3	.	1	25	1	.	1	.	.	28	
Gross Total	12	96	453	89	72	61	5	10	798	1	53	195	20	2	1	.	.	272	4	37	242	67	69	58	4	10	491	

BAVARIA.

1. The Criminal Code for the Kingdom of Bavaria, promulgated on the 10th of November 1861, and put in force on the 1st of July 1862, threatens the following crimes with the punishment of death:—

(*a.*) High treason (Hochverrath), according to the conditions contained in Art. 101 and 105 of the Criminal Code:

Art. 101.

1. Whoever attempts to kill the king, to injure him in body or in health, to take him prisoner, to deliver him into the hands of the enemy, to remove him from the Government, or to prevent him from performing the duties of the same; or

2. To remove the ruling family by force, or to change the order of succession or the constitution; or

3. Unlawfully to incorporate the kingdom with a foreign state or to subject it to one, or to separate a part of the territory of the state from the whole, commits an action which is at least the beginning of the execution of a criminal action, and is guilty of high treason, and shall be punished with death.

Art. 105.

If during a riot actions have been committed which, according to Art. 101, are defined as the beginning of a treasonable undertaking, only those who have committed such actions themselves, or have led the rioters, or have abetted the riot, or have taken part in a conspiracy conducting to the same, shall be punished with death, but the other persons concerned in the riot shall be imprisoned in the house of correction for not less than eight years.

(*b.*) Treason against the state (Landesverrath), according to the conditions contained in Arts. 110, 111, and 112 in the Criminal Code.

Art. 110.

A Bavarian, or a foreigner residing in Bavaria, or in the Bavarian service, who enters into negotiation with a foreign Government or a foreign potentate to involve Bavaria in war, or in any other manner affords cause, pretext, or occasion for such a war, shall, if the war really break out, be punished with death, if otherwise, with imprisonment in a house of correction for not less than eight years.

If the delinquent willingly and entirely give up his undertaking, and obviate every danger called forth by it, he shall remain unpunished.

Art. 111.

A Bavarian who enters into the service of the enemy during a war with Bavaria shall be punished with death.

A foreigner who is in the Bavarian service, and enters the service of the enemy after the war has broken out, shall be punished in like manner, unless the aforesaid army be that of his native country.

If a Bavarian be in the military service of a hostile state before the commencement of the war with Bavaria, and remain willingly in the same, he shall be imprisoned in a house of correction for not more than 12 years. In cases of less importance an imprisonment of not less than three years is to be awarded.

Art. 112.

A Bavarian, or a foreigner residing in Bavaria, or in the Bavarian service, who during a war with Bavaria affords aid to the enemy, or throws impediments in the way of the troops of Bavaria or her allies, or causes them any injury, shall be imprisoned in a house of correction for not more than 12 years.

1. But if the delinquent has put the enemy in possession of towns, fortresses, passes, or other places of defence, or of members of the Bavarian or allied armies, or

2. Has destroyed, or rendered useless, or put in the hands of the enemy fortifications, arsenals, military chests, stores or magazines of arms, and other necessaries of war, or
3. Has served the enemy as a spy, or has assisted him in espionage, or has imparted to him plans of operation, sketches of fortresses, camps, or other military points of importance, or intelligence regarding the strength and position of the troops and such like, or
4. Has conducted troops to the enemy, or has provided him with arms and other necessaries of war, or
5. Has seduced members of the Bavarian or allied armies to mutiny, flight, or desertion, shall be condemned to death.

(*c.*) Contempt against his or her Majesty's person (Majestaetsbeleidigung) is when any one ill-use the King or Queen, or lay an insulting hand on him or her in a manner different to the cases mentioned in the articles on high treason. (Arts. 121 and 123 of the Criminal Code.)

(*d.*) Murder (Art. 228).

(*e.*) Robbery, on the supposition that a person has suffered death in consequence of ill-treatment. (Art. 302 of the Criminal Code.)

(*f.*) Extortion, on the same supposition as in lit. *e.* (Art. 303, No. 1, of the Criminal Code); and finally

(*g.*) Abuse of executive and judicial authority, on the supposition that an official person might have a sentence of death executed which had not been passed according to law. (Art. 381, No. I, of the Criminal Code.)

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2. If a person has been found guilty of a capital crime, the jury have not the right of uniting with the verdict an opinion regarding the existence of mitigating circumstances, nor have they the right of substituting an inferior punishment on account of mitigating circumstances.

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3. The severest punishment after the punishment of death is imprisonment in a house of correction for life.

If by the grace of the King a milder punishment has been substituted for the punishment of death, this does not preclude any change in the same. On the contrary, by virtue of the unlimited power of pardon granted the King by the constitution, he is enabled to lessen the mitigated punishment still more, and even entirely to remit it.

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4. Till the 1st of July 1862, the day that the new criminal code of the 10th of November 1861 was introduced, the criminal code of the year 1813 had been valid in the parts of the Kingdom of Bavaria on this side of the Rhine.

A series of crimes, which before the introduction of the new criminal code had been considered capital crimes, are now no longer considered such; namely,—

(*a.*) Repeated infanticide.

(*b.*) The destruction of the fruit in the womb, and the causing an abortion, when the death of the mother had been the consequence of it.

(*c.*) Rape, when the person ravished had died of the ill-treatment.

(*d.*) Robbery, when the robber had tortured a person to extort from him the discovery of the place where property was concealed, or when he had ill-treated a person so as to put his life in danger, or had dangerously wounded or maimed him, or had caused him some lasting injury to his health. The chiefs and leaders of a band of robbers were threatened with death, if heavy robberies had been committed by the band.

(*e.*) Extortion on the same suppositions as under lit. *d.*

(*f.*) Arson, upon the following suppositions:—

i. If a man had lost his life, or had been dangerously injured during the fire;
ii. If the fire had spread so far as to reduce two or three dwelling houses to ashes;
iii. If the fire had been laid, or had broken out when the inhabitants were generally asleep; or if this had been done—
iv. In places of resort, where a great number of people might be exposed to injury;

v. If the fire had been laid during any other misfortune, such as a riot, an inundation, or perils caused by war or otherwise;
vi. If it had been set to buildings in which stores of powder had been accumulated, or to places in the neighbourhood of such buildings;
vii. If the fire had been laid that murder, robbery, theft, or other heavy crimes might be committed by the perpetrator under favour of it;
viii. If the criminal had set fire to buildings in several places in cities, towns, or villages, and the fire had broken out but in one;
ix. If the criminal had been guilty of arson in several places at different times.

(*g.*) Perjury, if an innocent person had been condemned to death on the false testimony of many.

(*h.*) Riot and rebellion, and particularly in reference to those persons who had committed murder, homicide, robbery, or arson, or had taken part in these crimes when committed by others, or had encouraged them; then, the abettors and ringleaders of the riot, if murder, homicide, robbery, or arson had been committed, whether they had urged them on to such crimes or not.

Since the 1st of July 1862, no facts have appeared to lead to the conclusion that by the diminution of the punishment an increase of the aforesaid crimes has been produced; but the time since the introduction of the new criminal code was introduced has been too short to justify us in forming any conclusion whatever respecting the results.

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5. The sentence of death is executed by beheading with the guillotine. The execution of the sentence is prescribed in Art. 15 of the Criminal Code, as follows:—

ART. 15.

The sentence of death is executed by means of the guillotine, in the presence of a commission of the court and of one of the attorneys general in an enclosed place.

Besides which 24 representatives of the parish or other respectable persons of the place are to be called together by the overseer of the place to serve as witnesses to the execution and to sign the document. If any should not appear, the commission of the court are empowered to appoint substitutes. An obligation, however, to appear at the execution does not exist either for the persons called by the overseer or for those appointed as substitutes by the commission of the court, nor is the execution to be delayed by their non-appearance.

Finally, one or two clergymen of the religion of the criminal are to be permitted to enter as well as his defender. Other persons may also be permitted to enter if particular reasons are assigned.

The execution of the sentence is to be announced by the tolling of a bell, which tolling is to continue till the conclusion of the execution.

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6. Since the introduction of public trials (1st January 1849) till the time when the Criminal Code of 1813 ceased to be valid (30th June 1862), therefore for 13 years and 6 months, 327 persons were condemned to death in the parts of the kingdom of Bavaria situated on this side of the Rhine, namely;

165 for murder
78 for robbery, and
84 for arson.

Of these 65 suffered death, namely, 50 murderers and 15 robbers. In 259 cases the punishment of death was remitted and changed into that of imprisonment by the grace of the king, namely:—

Into confinement in irons for life; 95 murderers, 46 robbers, and 23 persons guilty of arson.

Into imprisonment in the house of correction for an indefinite time, with the hopes of a further diminution of punishment after 16 years imprisonment, with incontestable proofs of improvement; 14 murderers, 13 robbers, and 30 persons guilty of arson.

Into imprisonment in the house of correction for a definite period (between 8 and 20 years); 3 murderers, 4 robbers, and 29 persons guilty of arson.

Into imprisonment for from 1 to 8 years; 2 persons guilty of arson.

EXTRACT from the Criminal Statistics of Bavaria.

During the course of 13½ years, or from the time of the first institution of oral procedure in Bavaria, namely, January 1, 1849, down to the introduction of the new and existing Criminal Code (June 30, 1862), the total amount of *sentences to death* pronounced by the tribunals in Bavaria (exclusive of the circle of the Rhine Palatinate) amounted to 327, viz.:—

165 for murder,
78 for robbery, with violence, &c.
84 for arson;

of which 65 were carried into execution (viz., 50 for murder and 15 for robbery). The remainder were commuted as follows:—

164 to (Kettenstrafe) hard labour in chains for life; viz., 95 for murder, 46 for robbery, 23 for arson.

57 to hard labour for undetermined periods, and liable, after the term of 16 years, to pardon for good conduct; viz., 14 for murder, 13 for robbery, 30 for arson.

36 to hard labour for periods ranging from 8 to 20 years; viz., 3 for murder, 4 for robbery, 29 for arson.

2 to house of correction, for periods ranging from 1 to 8 years, for arson.

AUSTRIA.

MY LORD. Vienna, September 2, 1864.

I BEG to acknowledge the receipt of your note of the 30th ultimo and hasten to fulfil your wish in forwarding to your Excellency the answers to the questions put to me.

1. The punishment of death is inflicted by the Austrian criminal code for the following crimes:—

(*a.*) For high treason in the most aggravated cases (ss. 53 & 59, litt. *a* and *b* of the Criminal Code).

(*b.*) For wilful damage to railways, steamers, steam-engines, etc., and generally for wilful damage to the property of others, in case the death of anyone should be caused by such wilful damage, and supposing the perpetrator could foresee such a result (ss. 85, litt. *e*, and 86 of the Criminal Code).

(*c.*) For the wilful neglect of the necessary caution imposed on persons employed on railways, steamers, or the management of steam-engines, etc., or for any wilful act against such works or undertakings, supposing that such neglect or such an act caused the death of anyone and that the perpetrator could foresee it (ss. 87 & 88 of the Criminal Code).

(*d.*) For murder; both in respect to the person who committed the murder or anyone who may have induced another to commit the murder and who may have assisted in committing the murder (s. 136 of the Criminal Code).

(*e.*) For highway robbery accompanied by violence and where death ensues from the violence used, in respect to all those who may have taken part in the killing (s. 141 of the Criminal Code).

(*f.*) For incendiarism when anyone's death is caused by the fire, and supposing the perpetrator could have foreseen it, or for incendiarism committed by a number of people conspiring together to produce great destruction to property (s. 167, litt. *a* of the Criminal Code).

(*g.*) After the declaration of military law, the punishment of death is to be pronounced for high treason, riot, murder, robbery, and incendiarism (s. 74 of the Criminal Code in connection with ss. 399 and 400 of the proceedings in the criminal courts).

(*h.*) Finally, the punishment of death is inflicted for the following crimes to be tried before the military courts, viz. (s. 67 of the Criminal Code) unlawful enlistment, (s. 92 of the Criminal Code) for inducing soldiers to desert, (s. 222 of the Criminal Code) and for forcing the line of troops posted to prevent the introduction of the plague, (s. 393 of the Criminal Code, and Imperial ordinance of the 21st May, 1805).

2. In cases where the punishment of death is decreed by law, the court must inflict this punishment upon the criminal if found guilty. If, however, mitigating circumstances are apparent, the court, after resolving upon the sentence, must take into consideration if there are any circumstances which admit of a recommendation to mercy. After having come to a decision on this point, the sentence is announced to the criminal, who has all the rights of appeal. The sentence is then, together with all the documents having reference to the proceedings, conveyed in the usual way through the minister of justice to the Emperor, who has alone the power to modify the punishment of death into a more lenient punishment (s. 52 of the Criminal Code in connection with ss. 293, 308, and 310 for criminal proceedings).

As the criminal courts, as will be seen from what I have already stated, have not the power to modify the punishment of death, the question, whether the courts often exercise the right accorded to them, falls to the ground.

3. The only punishments inflicted by the Austrian laws are the punishment of death and imprisonment. The latter consist in light or severe (close) imprisonment, and is either for a certain number of years or for life. The period of imprisonment varies according to the gravity of the crime in gradations from six months to one year, from one to five years, from five to 10 years, from 10 to 20 years. The heaviest punishment inflicted after the punishment of death is therefore severe—close imprisonment for life. Imprisonment for life is not always inflicted when the sentence of death passed on a criminal has been commuted; but when the Emperor shows mercy a shorter term of imprisonment is generally fixed, according to the advice of the courts.

4. During the last 12 years no alterations have been made in this part of our criminal laws. In the year 1852, however, a new official edition of the Criminal Code, which had existed since 1803, was published, and in this edition the punishment of death was abolished in cases of indirect participation in high treason (s. 59 of the Criminal Code), in cases of forgery of bank notes, stocks, or other State paper (ss. 108 and 109 of the Criminal Code), and in cases of repeated incendiarism (s. 167, litt. *b*, of the Criminal Code).

Notwithstanding the revision which took place, no increase of these crimes was remarked, with the exception of forgery; but I must observe that the true motive for this increase may be rather attributed to the greater amount of State paper which has come into circulation during the years mentioned, to the circumstance that no other money was in circulation during this period, and partly also to the insufficient care bestowed in the making of State paper in general.

5. The punishment of death is carried out by hanging, and publicly.

In cases which come before the military courts, and which I enumerated in my first answer, as well as in several cases which come under the martial law, the punishment is inflicted by shooting.

6. From the official statistics, published by the authorities, it is not possible to ascertain how often the sentence of death which was passed was commuted during the years mentioned into other punishments; but without exaggeration it may be stated that such commutation frequently took place, and that the sentence originally passed was only carried out when the case admitted no mitigating circumstances.

I have, &c.

D. J. WINNIWARTER.

The Right Hon. the Lord Bloomfield.

MEMORANDUM.

Vienna, September 12, 1864.

The proportion of capital sentences during the last twelve years which were carried into execution in the Austrian empire is as follows:—

From the year 1854 to the present time (1864) 5 per cent. of the whole number of sentences to death which were pronounced were carried out, the extreme punishment being commuted by the mercy of the Emperor in all the

remaining instances. During the years 1852 and 1853 the ratio was 8 per cent., this larger proportion being attributable to the circumstance that it was not thought right to extend the Imperial mercy to cases of conviction for highway robbery, which was of so frequent occurrence at that time in Hungary.

SAXONY.

1. At present, by the Penal Law of Saxony, the following crimes are punishable with death :—

High treason ; murder ; robbery, when any person has come to his death in consequence of violence used against him ; the heaviest cases of arson ; the killing by a thief of any person who arrests him, if the thief when caught in the act resort to violence in order to keep possession of the stolen property ; and perjury, when committed with intent to bring punishment upon an innocent person, such punishment consisting of death, and having been actually inflicted.

2. This question must be answered in the negative. Only in the cases expressly and specially laid down by the law itself can a lesser punishment be adjudged, instead of death, by the Court ; for example, in case of the youth of the criminal. A general or particular power of mitigation, such as the law allows a jury, or such as the Austrian law allows to the College of Judges, is unknown to the Saxon law.

3. The next punishment to that of death is imprisonment for life. The latter part of the question is met by the answer to the second question.

4. The former Penal Law, dating from the year 1838 was mainly identical with the latest, which came into force in the year 1856. Only there were in the Statute Book of the year 1838 two cases of robbery and one case of arson punishable with death, which, according to the present Statute Book, are only punishable with imprisonment for life. No cases of the sort, which would have been formerly punishable with death, but which would now incur only imprisonment for life, have occurred from the year 1856 up to the present time.

5. Since the year 1856, the so called intramural execution, and since the year 1852 decapitation by the guillotine, have been introduced into the kingdom of Saxony.

6. In the period from the year 1838 to the end of the month of August 1864, 80 accused persons have been legally sentenced to death.

The punishment of death was carried out on 26 criminals. Two condemned persons died before the execution of the Royal warrant, and 51 condemned persons, through the Royal clemency, had the sentence of death commuted to loss of liberty (in one case it is true for a term, but in the others for life) ; and, lastly, in the case of one condemned person the Royal decision is yet pending.

HANOVER.

Answers to questions concerning the existing law of Hanover with regard to offences punishable with death, translated and compiled from a note of Count Platen, the Hanoverian minister for Foreign Affairs, to Sir Henry Howard, dated September 8th, 1864, and its inclosures.

Answer to Question 1.

The punishment of death is threatened in cases of the crimes treated of,—

A. In Articles 119, 124, 139, No. 1 ; 165, No. 1 ; 175, No. 1 ; 183, 188, 189, 190, No. 1 ; 211, No. 1 ; paragraph 2. 227, 228 ; paragraph 1. 234 ;

Hannover, den 8. September 1864.

Hochwohlgeborner Herr,

In Erwiderung auf das gefällige Schreiben vom 29. v. M. beeile ich mich, die in Betreff des hannoverschen Rechts über die Todesstrafe gestellten Fragen im Folgenden ergebenst zu beantworten :—

Zu 1.

Todesstrafe is angedroht in den Verbrechensfällen,—

A. Der Artikel 119, 124, 139, No. 1 ; 165, No. 1 ; 175, No. 1 ; 183, 188, 189, 190, No. 1 ; 211, No. 1 ; Abs. 2. 227, 228 ; Abs. 1. 229, 231 ; Abs. 1.234 ;

paragraph 4. 329 of the General Criminal Code of the 8th of August 1840.

B. Of Article II. of the Law of the 8th of August 1846, concerning the punishment of crimes against the security of railway traffic.

As regards A.

Cases of High Treason (Hochverrath).

Article 119 of the Criminal Code says this crime shall be punishable with death in the following cases:—

I. When a subject has made an assault upon the sacred person of the king, and namely, in order to kill him, to take him prisoner or to deliver him into the power of the enemy, or to deprive him of bodily health, or of the use of his intellectual faculties, has employed means for this purpose, or in order to commit this crime has excited an insurrection, or has entered into a conspiracy in the limits of the country, or into a connexion with persons abroad.

II. When, in order to annex or to subject the kingdom to a foreign state, or to sever a part of its territory from the whole, or in order to promote plans directed towards this object, he has entered into a conspiracy, or excited an insurrection, or taken part in such treasonable connexions.

III. When, in order to change the existing constitution of the state by violent means, or to remove the legitimate regent from the government, or to drive away the reigning family, or to alter the constitutional settlement of the succession to the throne, he has entered into a conspiracy, or into a similar dangerous connexion, or has excited civil war or insurrection, or with this view has made a violent assault upon a member of the royal family.

Cases of Treason against the Country (Landesverrätherei).

Article 124 says: "Traitors to the "country shall be punishable with "death. When the state, however, "shall either have been not at all or "only in a very slight degree endan- "gered by acts of a treasonable nature "against the country, the punish- "ment of confinement in irons (Ket- "ten Strafe) is to be pronounced; the "judge is also authorized, in cases of "treason against the country which "do not come within the stipulations "of Article 123, to deviate from the

Abs. 4. 329 des allgemeinen Criminalgesetzbuchs vom 8. August 1840.

B. Des Artikels II. des Gesetzes vom 8. August 1846, betreffend die Bestrafung von Verbrechen gegen die Sicherheit des Eisenbahnbetriebes.

" punishment of death, to pronounce " the punishment of confinement in " irons, and even to descend to the " punishment of the house of correc- " tion (Zuchthaus Strafe)."

The following explanation of the different kinds of treason against the country, which accordingly involve the punishment of death, is found in the above quoted Article 123. Treason against the country exists, namely, in the following cases :—

I. When a subject has expressly called upon a foreign state to make war upon the kingdom, or with hostile design has given it occasion or opportunity for war, and more particularly when he has intentionally excited it to war by a treacherous betrayal of state secrets.

II. When a subject in a war which has broken out against the kingdom has with unlawful purpose assisted the enemy.

In this respect is especially to be considered as a traitor to his country :

(A.) Whoever has treasonably surrendered to the enemy occupied towns, fortresses, passes, or other defensive posts, or has effected their surrender or seizure by treason.

(B.) Whoever after the outbreak of a war has gone over to the enemy and borne arms against the kingdom.

(C.) Whoever has served the enemy as a spy, or communicated to him plans of operations, sketches of fortresses, has betrayed magazines, has assisted him with unlawful purpose, by the transmission of men, arms, supplies, or ammunition, has seduced soldiers to revolt, to desert, to pass over to the enemy, or to commit other similar disloyal acts, or with treasonable purpose to the country has harboured or concealed the enemy's spies.

Cases of Insult against the King's Majesty (Majestäts-Beleidigung).

Article 139, No. 1, says : " Whoever " violently assaults the sacred person " of the king shall be punishable with " death."

Cases of Insurrection (Aufruhr).

Article 165, No. 1, treating of the punishment when acts of violence have been committed, says : " If the assem- " bled multitude have really committed " acts of violence against persons or " things, as regards the participators " in them :—

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"I. Those who have committed "murder, manslaughter, arson, or "theft shall be condemned to the "punishment of death."

Cases of Duelling (Zweikampf).

Article No. 175, No. 1, says: "When "a duel has been agreed upon which "is to bring about the death of one of "the parties, and when one of the "parties has actually been killed, the "punishment of death is applicable to "the other party. Nevertheless, under "extenuating circumstances, a sen- "tence of confinement in irons (Ketten "Strafe) can be pronounced."

Cases of Arson (Brandstiftung).

Article 183 says: "Arson is punished "with death when one of the follow- "ing aggravating circumstances takes "place:—

"I. When by the fire which has "been caused, the destruction of one "or more inhabited buildings has "taken place. In the cases of solid "buildings it shall be considered as "equivalent to destruction when they "are completely gutted.

"II. When the death, or the wound- "ing with danger of life, of a human "being has been the consequence of "the fire caused, and the incendiary "could, from all the circumstances, "suppose that human beings were in "the buildings.

"III. When at a time when the "inhabitants of the buildings are ge- "nerally asleep, or when under pecu- "liar circumstances increasing the "difficulties of the saving of the hu- "man beings and of the extinction of "the fire, and known to the perpe- "trator, the fire has been set, and "thereby at least an inhabited build- "ing has been set on fire.

"IV. Where the fire has been set "to such places of assembly, where "by its being caused a great number "of human beings may be personally "exposed to danger.

"V. When the malefactor, in towns, "boroughs, villages, or farm premises, "sets fire to several buildings at the "same time, and the fire has destroyed "at least one of them.

"VI. When the arson has been "committed during an insurrection, "a scarcity of water, a danger from "war, or otherwise at a period of "common distress.

"VII. When the fire has been set "to buildings in which stores of pow-

" der are kept, or in the neighbour-
" hood of such stores, supposing the
" perpetrator to be cognizant of the
" peculiar danger of his act.

" VIII. When the fire has been set
" with the intention, under its cover,
" of the committing, by the incen-
" diary himself or by another person,
" of murder, robbery, theft, or another
" crime punishable with a heavy pe-
" nalty.

" IX. When the malefactor had
" previously threatened with setting
" fire, and one building at least has
" been ignited by his incendiarism.

" X. When the malefactor has al-
" ready, on account of former incen-
" diarisms, suffered the punishment
" of confinement in irons (Ketten
" Strafe), (or, according to Article 12,
" the punishment of the house of cor-
" rection instead of it,) and has again
" been guilty of setting fire to build-
" ings.

" XI. When the malefactor has
" committed at different times three
" acts, not already punished, of incen-
" diarism of buildings.

Cases of causing a Stranding (Verursachte Strandung).

Article No. 188 says: " Whoever
" with unlawful intention occasions
" the stranding or sinking of a ship,
" with danger for other persons or
" their property, shall, when a human
" life has thereby been lost, be punished
" with death, otherwise he shall be
" visited with the punishment of con-
" finement in irons. It would in this
" matter make no difference whether
" the perpetrator had himself shared
" the danger or not. In those cases,
" however, in which the danger con-
" fines itself merely to the property of
" other persons, and only affects an in-
" significant object, another punish-
" ment may, according to circum-
" stances, be awarded, but not below
" that of the workhouse (Arbeits-
" haus)."

Cases of causing an Inundation (Verursachte Ueberschwemmung).

Article No. 189 says: " Whoever
" with unlawful purpose, and with
" common danger to life and property,
" occasions an inundation by cutting
" through or injuring the dykes or
" dams, opening the locks or sluices,
" or in a similar manner has incurred
" the punishment of death, and, under
" peculiarly extenuating circumstances,

" the punishment of confinement in " irons."

Cases of Poisoning dangerous to the Public (Gemeingefährliche Vergiftung).

Article, No. 190, No. 1, says: " Whoever maliciously poisons wells, articles publicly exposed for sale, and " generally such things whereby an indefinite number of human beings " may lose life or health shall be " punished with death."

Cases of Perjury (Meineid).

Article No. 211, No. 1, says: " Whoever in a trial on account of a " crime has sworn a false oath in order " to bring an innocent person to " punishment shall,—

" I. When the crime which forms " the subject of the accusation could " entail the punishment of death, be " visited with the punishment of confinement in irons for 10 to 15 " years, and when the accused has " suffered the punishment of death, " with the punishment of confinement " in irons for life.

" If an innocent person has been " punished with death on the false " perjured testimony of several persons, the perjurors who have combined to give such testimony, as " well as the third person who has " commissioned or hired these false " witnesses, shall be punished with " death."

Cases of Murder (Mord).

Article 227 says: " The author of " a killing, who has either resolved " upon it of deliberate purpose, or " has carried it out, is guilty of " murder. The murderer shall be " punished with death."

Article 228 says: " Shall be punished in the same manner as a " murderer, whoever has administered " to another poison or other substances dangerous to life, with the " intention only of injuring and not " of killing the poisoned person, and " has thereby occasioned his death."

Article No. 229, and the Law of the 31st of December 1859, say: " The " punishment of death takes place " when poison or some other substance " dangerous to life has been administered to a person, and his death " has been thereby occasioned."

Cases of Manslaughter (Vodtschlag).

Article 231, says: " Manslaughter " shall be punished with the punish-

" ment of confinement in irons up to " 20 years, and, when it is proved " that the intention of the homicide " was decidedly and plainly directed " towards killing, with death. When, " however, the person who has been " killed has himself provoked the anger " of the homicide by peculiarly serious " insults, public affronts, or violent " ill-usage, the sentence to be pro- " nounced is to be the house of cor- " rection, and, in the case of the other- " wise legal punishment of death, from " six years house of correction to 10 " years' confinement in irons."

Cases of Infanticide (Kindesmord).

Article 234, paragraph 4, says: "An " infanticide, who after having suf- " fered her punishment is again guilty " of this crime, and namely in respect " to a child capable of living, is to be " punished with death, provided that " there are no peculiarly extenuating " circumstances, in case of the exist- " ence of which the judge is permitted " to sentence her to the punishment " of the house of correction for life."

Cases of Robbery (Raub).

Paragraph 21 of the Law of the 20th of April 1857 (modifying Article No. 329 of the Criminal Code) says: " Robbery shall be punished with " death when the illtreatment or bo- " dily harm inflicted upon a person " has had a fatal consequence."

As regards B.

Cases of Crimes against the Security of Railway Traffic.

Paragraph 1 of Article 1 of the Law of the 8th August 1846, for the punishment of these crimes, says: " Whoever with unlawful purpose is " guilty of such an act in respect to a " railway, its appurtenances or roll- " ing stock, or places such impedi- " ments in the way of its working as " shall occasion danger to human " beings, or to things on their being " expedited by rail, is to be punished " according to the degree of danger, " in more trivial cases with the work- " house, and in severer cases with the " house of correction."

Article 2 says: " Has a human " being, in consequence of an act in- " volving a penal punishment (com- " pare Article 1), lost his life, the " punishment of confinement in irons " for not less than 10 years, and when

" that result was intended, the *punish-*
" *ment of death* is to be awarded."

This closes the cases of crimes punishable with death.

Answer to Question No. 2.

The so-called system of extenuating circumstances, prevailing in France and in other countries, which authorizes the Jury or the Court of Justice, by the adoption of extenuating circumstances, to exclude the legally threatened punishment of death, is unknown to the Hanoverian legislation. Only in the Articles 175, No. 1, 189 and 234, paragraph 4, of the General Criminal Code (above quoted) is the Court authorized by the law, on account of extenuating circumstances, to abstain from pronouncing the sentence of punishment of death. Cases in which the application of this authorization could have been questioned are not shown to have occurred.

Moreover Article 97 of the General Criminal Code directs the Court to propose a mitigation of punishment as an act of grace, when, on account of the number and importance of the extenuating circumstances that have combined together, the punishment threatened by the law, absolutely or in the lowest degree, does not bear any proportion with the culpability of the individual case, and would thus not be compatible with the principles laid down in the law. In virtue of this stipulation, the remission of the punishment of death by way of pardon has sometimes been proposed by the Courts, namely, in cases of arson, and of the murder of a relation committed by an unmarried mother upon her newly born or only a few weeks old child.

Answer to Question 3.

The punishment next in severity to the punishment of death is the punishment of confinement in irons (Ketten-Strafe); for persons of the female sex the punishment of the house of correction (Zuchthaus-Strafe).

The punishment of confinement in irons cannot be awarded for less than six years, and may be so for life. The person condemned to the punishment of confinement in irons is employed by the State on public works, or, when there is no such opportunity, on works in the interior of the penal establishment, in both cases in chains. Per-

Zu 2.

Das in Frankreich und anderen Staaten geltende sogen. System der mildernden Umstände, welches die Geschworenen oder das Gericht berechtigt durch die Annahme mildernder Umstände die gesetzlich gedrohte Todesstrafe auszuschliessen, ist der hannoverschen Gesetzgebung nicht bekannt. Nur in den Fällen der Artikel 175, No. 1, 189 und 234, Abs. 4, des allgemeinen Criminalgesetzbuchs ist das *Gericht* durch das Gesetz ermächtigt, wegen mildernder Umstände von Erkennung der Todesstrafe abzusehen. Fälle, bei denen die Anwendung dieser Ermächtigung hätte in Frage kommen können, sind nicht nachweisbar.

Uebrigens weist der Artikel 97 des allgemeinen Criminalgesetzbuchs das Gericht an, eine Strafmilderung im Wege der Gnade bei dem Justiz-Ministerium in Antrag zu bringen, wenn wegen Menge und Wichtigkeit zusammentreffender mildernder Umstände die im Gesetze absolut oder im niedrigsten Grade gedrohte Strafe mit der Strafbarkeit des einzelnen Falles in keinem Verhältnisse stehen und solchergestalt mit den im Gesetze befolgten Grundsätzen nicht zu vereinigen sein würde. Auf Grund dieser Bestimmung ist von den Gerichten bisweilen der begnadigungsweise Erlass der Todesstrafe beantragt worden, namentlich in Fällen der Brandstiftung und des Verwandtenmordes, verübt von der unverehelichten Mutter an ihrem neugeborenen oder doch erst wenige Wochen alten Kinde.

Zu 3.

Die der Todesstrafe nächst harte Strafe ist die Kettenstrafe, für Personen weiblichen Geschlechts die Zuchthausstrafe.

Kettenstrafe darf nicht unter sechs Jahren, kann aber bis auf Lebenszeit erkannt werden. Der zur Kettenstrafe Verurtheilte wird von dem Staate zu öffentlichen Arbeiten, oder, wenn es hierzu an Gelegenheit fehlt, zu Arbeiten im Inneren der Strafanstalt, beides in Ketten, gebraucht. Personen weiblichen Geschlechts wer-

sons of the female sex, instead of the punishment of confinement in irons, which they have incurred, are condemned to the house of correction for the whole period of its duration.

Where the law exceptionally permits the Court, on account of extenuating circumstances, to deviate from the legally threatened punishment of death, it is replaced, in the cases of Article 175, No. 1, and 189 of the Criminal Code (quoted above), by the punishment of confinement in irons, the determination of which, within the legal minimum and maximum, is left to the discretion of the Judge; in the case, on the other hand, of Article 234, paragraph 4, of the Criminal Code (quoted above), by the punishment of the house of correction for life.

The pardoning power does not assume that the punishment of confinement, to be substituted by way of grace for the punishment of death, should be awarded to the person pardoned for its longest duration, that is to say for life, but determines it, on the contrary, according to its free judgment, taking into consideration the importance of the extenuating circumstances which present themselves. In cases of arson, commutations of the punishment of death into 15 years of the punishment of confinement in irons are not unusual.

Answer to Question No. 4.

According to the General Criminal Code of the 8th of August 1840, the punishment of death was threatened for the crime of robbery committed, under certain aggravating circumstances, in three cases. It has been set aside by the law of the 20th of April 1857. An increase of the crime of robbery, namely, under those aggravating circumstances, has not since shown itself.

Answer to Question No. 5.

The execution of the punishment of death, and the course of proceeding to be observed in respect to it, are regulated by the law of the 31st of December 1859, and the Royal Ordinance of the 1st of May 1860.

The above-mentioned law says :—

§ 1. The punishment of death is carried into effect by the guillotine (Fallschwert).

§ 2. No aggravation of the punishment of death takes place. The Courts of Justice have to pass a sentence of death without an aggravation in the

den statt der verwirkten Kettenstrafe für die ganze Dauer derselben zum Zuchthause verurtheilt.

Wo das Gesetz ausnahmsweise dem Gerichte gestattet, wegen mildernder Umstände von der gesetzlich gedrohten Todesstrafe abzuweichen, tritt an deren Stelle, in den Fällen der Artikel 175, No. 1, und 189 des Criminalgesetzbuchs, Kettenstrafe, deren Festsetzung innerhalb des gesetzlichen Minimums und Maximums dem richterlichen Ermessen überlassen ist, im Falle des Artikels 234, Abs. 4, des Criminalgesetzbuchs dagegen lebenswierige Zuchthausstrafe.

Die begnadigende Gewalt geht nicht davon aus, dass die im Gnadenwege der Todesstrafe zu substituirende Freiheitsstrafe dem Begnadigten in ihrer höchsten Dauer, d. h. als lebenslängliche, zu Theil werden müsse, bestimmt vielmehr dieselbe nach ihrem freien Ermessen unter Berücksichtigung des Gewichts der vorliegenden Milderungsgründe. In Brandstiftungsfällen sind Verwandlungen der Todesstrafe in 15-jährige Kettenstrafe nicht ungewöhnlich.

Zu 4.

Nach dem allgemeinen Criminalgesetzbuche vom 8. August 1840 war für das Verbrechen des Raubes, verübt unter gewissen erschwerenden Umständen, in drei Fällen die Todesstrafe angedroht. Dieselbe ist durch das Gesetz vom 20. April 1857 beseitigt worden. Ein Ueberhandnehmen des Verbrechens des Raubes, namentlich unter jenen erschwerenden Umständen, hat sich seitdem nicht gezeigt.

Zu 5.

Die Vollstreckung der Todesstrafe und das dabei zu beobachtende Verfahren richted sich nach dem Gesetze vom 31. December 1859 und der königlichen Verordnung vom 1. Mai 1860.

Das oben erwähnte Gesetz sagt :—

§ 1. Die Todesstrafe wird mit dem Fallschwerte vollzogen.

§ 2. Eine Schärfung der Todesstrafe findet nicht Statt.

Die Gerichte haben in den Fällen, in welchen das allgemeine Criminal-

cases in which the General Criminal Code of the 8th of August 1840 threatens an aggravated punishment of death.

The above-mentioned Ordinance says, "the punishment of death shall "be carried into effect in an enclosed "space, in the presence of two officers "of the Attorney-General's Depart- "ment, of a clerk to a Court of "Justice, who has to draw up a pro- "tocol concerning the event, of a "medical man attached to a Court of "Justice, and of one or more clergy- "men belonging to the religion of the "condemned person."

The Attorney-General, upon whom devolves the direction of the execution, has to take care that at least 12 burghers of the parish of the locality where the sentence of death is carried into effect shall be present at it.

The defender (advocate) of the condemned person and his nearer relations are to be admitted to it. The Attorney General can, as far as the space allows, also grant admission to other male adults.

The execution of the punishment of death which has taken place is to be made known as soon as possible in the provincial newspaper of the locality in which the condemning Court of Justice has its seat, and, besides that, in a public journal read in the locality of the execution.

Gesetzbuch vom 8ten August 1840 geschärfte Todesstrafe androht, auf die Todesstrafe ohne Schärfung zu erkennen.

Die oben erwähnte Verordnung sagt: Die Todesstrafe soll in einem umschlossenen Raume in Gegenwart zweier Beamten der Kronanwaltschaft, eines Gerichtsschreibers, der über den Hergang ein Protocoll aufzunehmen hat, eines Gerichtsarztes und eines oder mehrerer Geistlichen von der Confession des Verurtheilten vollstreckt werden.

Der Kronanwalt, dem die Leitung der Hinrichtung obliegt, hat dafür zu sorgen, dass derselben mindestens zwölf Bürger der Gemeinde des Orts beiwohnen, an welchem das Todesurtheil in Vollzug gesetzt wird.

Der Vertheidiger des Verurtheilten und dessen nähere Verwandte sind bei der Hinrichtung zuzulassen. Ausserdem kann der Kronanwalt, soweit es die Räumlichkeit erlaubt, auch anderen erwachsenen männlichen Personen den Zutritt gestatten.

Die stattgehabte Vollstreckung der Todesstrafe ist durch das Provinzialblatt des Orts, an welchem das verurtheilende Gericht seinen Sitz hat, und ausserdem durch ein am Orte des Vollzugs gelesenes öffentliches Blatt baldmöglichst bekannt zu machen.

Answer to Question No. 6.

Years.	Sentences of Death were passed.	Commuted by way of Pardon into the Punishment of Confinement.
1852	3	3
1853	8	6*
1854	9	7†
1855	7	6
1856	5	1
1857	3	0
1858	5	4
1859	10	8
1860	8	6
1861	4	2
62	5	4
	3	2

mmitted suicide before the d taken a resolution.
tted suicide before the en a decision.

Zu 6.

Jahre.	Es sind Todesurtheile gefällt.	Benadigungsweise in Freiheitsstrafe verwandelt.
1852	3	3
1853	8	6*
1854	9	7†
1855	7	6
1856	5	1
1857	3	0
1858	5	4
1859	10	8
1860	8	6
1861	4	2
1862	5	4
1863	3	2

* Eine Person hat sich vor Entschliessung der begnadigenden Gewalt entleibt.
† Eine Person had sich vor Entschliessung der begnadigenden Gewalt entleibt.

A considerable number of pardons were, moreover, not decreed on account of the extenuating motives connected with the condemnations, but solely because the execution of the legally incurred punishment of death would have been at variance with the sense of right of the present age and the precepts of distributive justice emanating from it.

Eine erhebliche Anzahl der Begnadigungen ist übrigens nicht wegen der den Verurtheilten zur Seite stehenden Milderungsgründe, sondern lediglich deshalb verfügt worden, weil die Vollstreckung der gesetzlich verwirkten Todesstrafe mit dem Rechtsbewusstsein der Gegenwart und den sich daraus ergebenden Geboten der distributiven Gerechtigkeit in Widerspruch treten würde.

Zum leichteren Verständniss der vorstehenden Notizen beehre ich mich noch ein Exemplar des 3. Bandes der Leonhardtschen Justizgesetzgebung des Königreichs, welcher das Criminalgesetzbuch und dessen Nebengesetze enthält, sowie einen Abdruck des oben angeführten Gesetzes vom 31. December 1859 und der königlichen Verordnung vom 1. May 1860 ergebenst hieneben zu übersenden.

Zugleich benutze ich, &c.

(Signed) PLATEN-HALLERMUND.

ITALY.

MY LORD, Turin, 30th August 1864.

IN conformity with the instructions contained in your Lordship's Despatch No. 113, Circular of the 24th instant, I have the honour to enclose herewith a list of replies to the questions contained in that Despatch.

In order that there might be as little delay as possible in the transmission of these answers I have procured the information in question from Lieutenant Cheapusso, the legal adviser usually employed by H.M. Legation.

I have, &c.

The Earl Russell. (Signed) HENRY ELLIOT.

1. In all the provinces of Italy, with the exception of Tuscany, where the punishment of death is not allowed, the Penal Code, brought into force on the 1st of May 1860, regulates criminal cases.

This code prescribes the punishment of death for the following crimes :—

(1.) Any attempt upon the sacred person of the King and upon the persons of the Royal Family.
(2.) Parricide.
(3.) Poisoning.
(4.) Infanticide.
(5.) Assassination.

In regard to infanticide, the punishment may be diminished from one to three degrees in the case of a mother who may have committed it upon an illegitimate child.

1. A l'exception de la Toscane, où la peine de mort n'est pas admise, dans toutes les autres provinces de l'Italie c'est le Code Pénal, mis en vigueur le 1 Mai 1860, qui règle la partie criminelle.

Ce Code prescrit la peine de mort pour les crimes suivantes :—

(1.) L'attentat contre la personne sacrée du Roi et contre les personnes de la Famille Royale.
(2.) Le parricide.
(3.) L'empoisonnement.
(4.) L'infanticide.
(5.) L'assassinat.

Quant à l'infanticide, la peine peut être diminuée d'un à trois degrés, par rapport à la mère qui l'aurait commis sur un enfant illégitime.

(6.) Wilful homicide, but only when it is accompanied by one of the following circumstances:—

(*a.*) When it is committed in the execution of an order either paid for or gratuitous.

(*b.*) When it has been committed without any motive, and on the sole impulse of brutal ferocity.

(*c.*) When its object has been to prepare for, facilitate, or commit another crime, or in aid of robbery, or to favour the escape and impunity of the principals and accomplices in such crimes, even though the object should not be accomplished.

(*d.*) When it has been the means or the immediate consequence of the offence of opposing the law.

(7.) Robbery with open violence when it is accompanied with homicide.

(8.) Incendiarism or other acts of destruction which may have caused the death of any one.

2. The Code declares that the Judges may diminish the punishment within the limits determined by the law.

Age, certain physical conditions, as being deaf and dumb, being almost imbecile, violence, great provocation, &c. are extenuating circumstances which authorize the Judges to diminish from one to several degrees the punishment prescribed for ordinary cases.

The Jury, in answering the Court whether the accused is or is not guilty of the crime imputed to him, if they believe there is any extenuating circumstance, declare that belief and express their opinion of the greater or less importance of the extenuating circumstance.

The Judge is always obliged to take account of the extenuating circumstances, and to diminish the punishment by one or several degrees in consideration of the circumstances admitted by the jury.

3. The criminal punishments of the Italian Penal Code are:—

(1.) Death.
(2.) Penal servitude for life.
(3.) Penal servitude for a term.
(4.) Imprisonment.
(5.) Transportation.
(6.) Interdiction of public duties.

The punishment of death may be substituted by transportation, and even by correctional punishment, such

(6.) L'homicide volontaire, mais lorsqu'il est accompagné d'une des circonstances suivantes:—

(*a.*) Quand il est commis en exécution d'un mandat salarié ou gratuit.

(*b.*) Quand il a été commis sans aucun motif, et par la seule impulsion d'une brutale férocité.

(*c.*) Quand il a eu pour objet de préparer, faciliter, ou de commettre un autre crime, ou de favoriser le vol, ou l'évasion et l'impunité des auteurs et complices de ces crimes, lorsque même l'effet ne s'en serait pas suivi.

(*d.*) Quand il a été moyen ou conséquence immédiate du délit de rébellion à la justice.

(7.) Le vol à force ouverte, lorsqu'il est accompagné d'homicide.

(8.) L'incendie ou autre destruction qui ait causé la mort à quelqu'un.

2. Le Code déclare que les juges peuvent diminuer les peines dans les limites déterminés par la loi.

L'âge, certaines conditions physiques, comme le sourd et muet, la presqu'imbécilité, la violence, la provocation grave, &c. sont des circonstances atténuantes qui autorisent les juges de diminuer d'un à plusieurs degrés les peines prescrites pour les cas ordinaires.

Le jury, en répondant au Tribunal si l'accusé est ou non coupable du crime qu'on lui impute, s'il croit qu'il y a circonstance atténuante, il le déclare, expérimant l'importance plus ou moins grande de la circonstance atténuante.

Le juge est toujours obligé de tenir compte des circonstances atténuantes, et de diminuer la peine d'un ou plusieurs degrés, et en considération des circonstances admises par le jury.

3. Les peines criminelles, selon le Code Pénal Italien, sont:—

(1.) La mort.
(2.) Les travaux forcés en vie.
(3.) Les travaux forcés à temps.
(4.) La reclusion.
(5.) La relégation.
(6.) Interdiction des fonctions publiques.

La peine de morte peut être réduite á la relégation, et même aux peines correctionelles, comme l'empri-

as imprisonment, if there is a concurrence of important extenuating circumstances.

When the Courts have definitely decided upon the punishment which the criminal deserves, he must undergo it in the manner settled by the regulations; there is no difference between one criminal and another.

The Chief of the State may commute the punishment; this, however, very rarely happens in criminal cases.

4. Since the Code of 1859, which was brought into execution on the 1st of May 1860, there has been no alteration of the penal law in Italy; there have, however, been alterations in the military Penal Code, and some exceptional and temporary laws against brigandage in the Neapolitan provinces.

The Code of 1859 is of a more humane character than that of 1839, in force in the Sardinian states, inasmuch as it has admitted many circumstances which authorize the substitution of a lighter punishment for a heavier one.

But the greatest alteration is that which was made by the Penal Code of 1839 in the Constitutions of 1770, which had been revived at the restoration.

The punishment of death was prescribed by the Constitutions of 1770 for acts of violation and of contempt of religion, and for robbery with open violence.

The Code of 1839 had, in crimes against religion, restricted the punishment of death to the act of trampling the sacred Host under feet; the code of 1859 makes no distinction between this and other acts of violation, and the punishment of death is no longer mentioned.

Robbery by armed force was punished with death by the Code of 1839, if it was accompanied by homicide, only attempted, or by wounds of a character to constitute a crime.

In the Code of 1859 death is not prescribed for robbery by open violence unless it is accompanied with homicide.

All crimes have diminished except the falsification of writings and offences against the currency, the stock-certificates of the state debt and of shares in companies.

Civilization has diminished sanguinary crimes, rather than the diminution of punishments.

sonment, s'il y a concurrence de graves circonstances atténuantes.

Lorsque les Tribunaux ont définitivement statué sur la peine méritée par le coupable, celui-ci doit le subir de la manière établie par les règlements; il n'y a pas de différence entre un ou autre coupable.

Le Chef de l'Etat peut changer la peine; c'est cependant ce qui arrive bien rarement par rapport aux pièces criminelles.

4. Après le Code du 1859, qui a été mis en exécution le 1 Mai 1860, il n'y a pas eu en Italie de changement dans la loi pénale, comme il y a eu des changements dans le Code Pénal Militaire; et quelques lois exceptionelles et temporaires contre le brigandage dans les provinces Napolitaines.

Le Code de 1859 est plus humanitaire de celui de 1839 en vigueur dans les états Sardes, en ce qu'il a admis beaucoup de circonstances qui autorisent le passage d'une peine plus grave à une autre moins grave.

Mais le plus grand changement est celui qui avait été porté par le Code Pénal du 1839 sur les Constitutions de 1770, qui avaient été rappellées en vigueur à la restauration.

La peine de mort était prescrite par les Constitutions du 1770 pour des actes de violation et de mépris contre la religion et le vol à force ouverte.

Le Code en 1839 avait, dans les crimes contre la religion, réduit la peine de mort à l'acte par lequel l'on foulait aux pieds les hosties sacrées; le Code de 1859 ne sépare par ce fait des autres violations, et il n'est plus parlé de peine de mort.

Le vol à force armée était puni de mort par le Code du 1839, s'il était accompagné d'homicide simplement tenté, ou de blessures de nature à constituer un crime.

Selon le Code de 1859 la mort n'est prescrite dans le vol à force ouverte, que lorsqu'il est accompagné d'homicide.

Les crimes ont tous diminués, sauf les faux en écritures et les forfeitures en monnaie, et titres de la dette d'etat on des actions de la société.

La civilization a diminué les crimes de sang plutôt que la diminution des peines.

Yet the abrogation of the punishment of death for robbery by open force, even unaccompanied by homicide, has much diminished the number of the homicides that were committed before that abrogation.

The reason of this is that he who committed the crime, knowing the punishment that awaited him, had every reason to put to death the person whom he had attacked for the purpose of robbing him, in order to destroy the evidence of the crime.

5. The punishment of death is inflicted in some provinces of Italy by beheading, in others by hanging.

The execution always takes place in public.

6. Excepting under circumstances which the (laws) have not provided for, and which yet deserve attention, the Chief of the State does not commute the punishment of death, for the cases are very rare in which the Judges themselves have not to substitute the punishment of penal servitude for life for that of death.

It is therefore impossible to make a definite statement; for it might happen in one year that in two cases of condemnation scarcely capital, both deserve the Sovereign's pardon, and that for ten years, and in a hundred cases, not one of the criminals has deserved that pardon.

Cependant avoir abrogé la peine de mort pour le vol à force ouverte, même non accompagné d'homicide, a diminué de beaucoup le nombres des homicides qui se commettaient avant l'abrogation susdite.

La raison en est que l'auteur du crime, connaissant la peine qui l'attendait, avait tout intérêt de donner la mort à celui qu'il avait assailli pour le voler, pour détruire le témoignage de son crime.

5. La peine de mort l'exécute en quelques provinces d'Italie par la décapitation, en d'autres par la suspension.

L'exécution se fait toujours en publique.

6. Sauf le cas de circonstances que les n'ont pu prévoir, et qui méritent des égards, le Chef de l'Etat ne change pas la peine de mort, car ils sont très-rares les cas que les juges eux-mêmes n'aient pas à passer de la peine de mort à celle des travaux forcés à vie.

Il serait ainsi impossible d'établir une proposition, car il se peut que dans une anneé sur deux cas de condamnation à peine capitale tous les deux mérite la grâce souveraine, et que pendant dix ans, et sur cent cas, pas un des coupables aie mérité cette grâce.

NOTE from MINISTER of JUSTICE upon CAPITAL PUNISHMENT.

MY LORD, Turin, February 1, 1865.

I REQUESTED the Minister of Justice to have the goodness to procure the additional information respecting Capital Punishment in Tuscany and the Republic of San Marino, which, by your despatch, No. 182, of the 16th December 1864, your Lordship directed me to obtain.

I have now the honour to enclose a copy and translation of the reply which I have received from M. Vacca, who, however, in complying as far as he is able with the wishes of Her Majesty's Government, remarks upon the insufficiency of the statistics of Tuscany.

His Excellency at my request is also endeavouring to procure the information required with respect to San Marino, although with a total population not equal to that of a small country town it can hardly be expected to contribute much.

I have, &c.

Earl Russell, &c. &c. (Signed) HENRY ELLIOT.

MINISTRY of GRACE and JUSTICE.

Turin, January 29, 1865.

In order to reply to the information sought for by your Excellency in your despatch of the 5th instant regarding Capital Punishment, I must explain that there are two distinct systems in force at present in Italy.

In all the provinces, except the Romagna, the Penal Code of the 20th of November 1859 is in vigour, which is a revision of the Sardinian Code; in the

Romagna, on the contrary, the Code of the 20th of June 1853, promulgated by the Ex-Grand Duke, is in force. In reality both these Codes recognize the punishment of death; but in Tuscany a law of the Provincial Government of the 30th of April 1859 has abolished Capital Punishment, and the successive laws of the 4th of May and 5th of September of the same year modified and regulated the penal scale, substituting for the punishment of death imprisonment for life, and shortly afterwards they augmented the punishment of penal servitude (*casa di forza*), which extended to 20 years, and increased it to 25 years in the cases where formerly imprisonment for life was inflicted, and thus restored the equilibrium which had been disturbed by the abolishment of Capital Punishment.

One of the gravest problems existing at present in the legislative unification of Italy is whether Capital Punishment should be abolished in all the provinces, a measure which has been asked for by many popular meetings and petitions; or if, on the other hand, in order not to expose these provinces to the dangers of a too hasty abolition, Capital Punishment should be also introduced into Tuscany.

It is under this aspect also that the Government is occupied in investigating the results of experience, which, however, cannot yet be said to be fully known.

In the meantime, in order to supply the information asked for by your Excellency, I have had recourse to the President of the Court of Cassation at Florence, since one of the pernicious effects of the (so to call it) autonomy which remains in Tuscany is the preservation also of the internal regulations for the transaction of business, amongst others, that of abstaining from sending periodical statistics to the ministry, as is done by all other judicial authorities. I have also been obliged to remark with disapprobation that in Tuscany no exact statistical annotations are established, and for that reason also in this matter of Capital Punishment I have not been able to obtain an exact prospectus of increase and decrease of crime, but only a table of some few cases of homicide in which the authors have been discovered or prosecuted, whilst in other cases no record has been kept.

This being premised, the following is the the result of my inquiry.

From the 16th of November 1852 (when the Grand Duke, before the code was yet published, re-established the punishment of death, which had been abolished in 1849) until the 30th of April 1859, at which time Capital Punishment was abolished there occurred in Tuscany,—

Twenty crimes of homicide for the sake of robbery.

Seven crimes of premeditated homicide.

From the 1st of May 1859 till the 31st of November 1864 there were 10 crimes of homicide for sake of robbery.

Twelve crimes of homicide premeditated.

In one and the other period only those crimes of homicide are taken into account the authors of which have been discovered.

It is necessary to remark upon the preceding data that the first period consists of 2,310 days.

That the second period is one of 2,040 days.

That therefore the 27 homicides of the first period represent a homicide every 86 days.

And that the 22 homicides of the second period represent a homicide every 90 days.

The difference of the proportion is almost imperceptible, but it is worthy of remark that the premeditated homicides were only seven in all the 2,310 days whilst Capital Punishment was in force, that is to say, one every 328 days; and that on the other hand, after the abolition of Capital Punishment there were 12 homicides in 2,040 days, that is to say, one every 170 days; and that therefore the number of homicides has been nearly double (since the abolition of Capital Punishment).

It is not, moreover, out of place to remark, although a serious thing to say, that in the second period the authors of the homicides committed for sake of robbery do not appear to have been discovered in the greater part of the cases, and that hence the authorities of public security have not succeeded in discharging efficaciously their duty; on the contrary, it is quite certain, and not only the public journals, but also communications from my colleague,

the Minister of the Interior, assure me of the truth of my assertion, that during some years, and more especially for the last few months, Tuscany has suffered from frequent and serious murders committed for the most part for the sake of plunder. It is customary in the cases of premeditated homicide to note the cause which may have induced the crime, since it is generally to be attributed to passions easily discerned, such as revenge, jealousy, &c.; but, on the contrary, no personal motive, except that of cupidity, incites to murder for the sake of robbery, and with this sole object in view, the murderer directs his attack against inoffensive persons with whom he may have no acquaintance, and it is thus easy to understand that it is less difficult to trace perpetrators of premeditated murder than those who have committed their crime for the mere lust of gain, and so much the more that the first are people living in the country and well known there (except in the case of hired assassins), and the second may belong to another country and have no personal relation with their victim.

With these observations, which have appeared to me necessary for the better understanding of the above figures,

I have, &c.

The Honourable Henry G. Elliot, &c. &c. &c.

(Signed) G. Vacca,
Minister of Grace and Justice.

On the Penalty of Death.—Extracts from the Tuscan Penal Code; illustrated according to the principles of right in jurisprudence.

Historical Observations.

Leopold I., of the House of Lorraine, a disciple of the philosophy of the 18th century, after having abolished torture and publicly burnt its gloomy and abominable instruments, put an end to the penalty of death by the celebrated law of the 30th of November, 1786, of which Art. 51 declares that, "The "penalty of death against any criminal, either present or contumacious, even "after confession of, or conviction for, whatever crime, declared to be capital "by the laws hitherto promulgated, it is to be henceforth abolished."

Leopold I. being raised to a more powerful throne [as Emperor] a new law was promulgated on the 30th of June, 1790, which re-established Capital Punishment against all those who should dare to incite or stir the people to rebellion, and who should lead the nation to resist violently the measures of the Government or to the commission of other excesses or disorders of a similar kind.

On the advent of Ferdinand III. the Leopoldine law was amended on the 30th of August, 1795. The penalty of death was extended to the crimes enumerated in Art. 9 of the law of the 30th of June, 1790, to homicide committed with premeditation, in which were included infanticide, poisoning, and all other qualified crimes.

Under the Bourbon dynasty, the Tuscan legislation underwent no alteration, although there was a penal law promulgated.

Under the Imperial Government from 1808 to 1814, Tuscany was placed under French legislation, and submitted, first, to the Draconian laws of the Republic, and then to the severe rule of the penal code of 1810.

On being reinstated, the Tuscan Government restored the penal laws of Leopold and of Ferdinand, but by the law of the 22nd of June, 1816, it increased the number of crimes punishable by death and extended it to robbery accompanied with violence. From the 22nd of June, 1816, to the 11th of October, 1847, no change took place in the legislation with regard to Capital Punishment; it was at that time that the duchy of Lucca was added to the Grand-duchy and that the *motu-proprio* of the 11th of October, 1857, was published by which Capital Punishments were abolished in the territory of Lucca. In fact, previous to this *motu-proprio*, there existed no law or sovereign decree abolishing it; but the clear wording of the said *motu-proprio* persuaded the Court of Cassation to declare that the abolition of the penalty of death should be extended to the whole of Tuscany; and by a decree of the 25th of February, 1848, Capital Punishment was declared to be abolished throughout the whole of the Grand-duchy. On the 16th of November, 1852, came an epoch of repression for crimes of public violence against government and religion, for those of high treason, for premeditated murder, and for robbery with violence.

Jurisprudence of Tuscan Tribunals on Capital Punishment.

During the reign of Leopold I. the Tuscan magistracy was the only body of the State that understood the high and civilising mission of the chief legislator who would destroy the remnants of barbarism and of feudalism. It will, therefore, be no matter of surprise to see the repugnance with which the ulterior laws which re-established Capital Punishment were applied, and that was the reason why its application was not more frequent. The necessity of subjecting the theory of legal conviction demands the means of proving and unquestionable evidence, opening the way to the most searching judicial inquiry, always requiring extraordinary trouble and frequent cases of administration occasioning deviation from the grave sanction of the law.

Nevertheless, the law of the 30th of June, 1790, on acts of public violence, was never applied in its severity; the same may be said of the law of the 30th of August, 1795, as regards crimes against the Catholic religion. In 1799, in 1821, in 1831 and 1832, there were not a few crimes of high treason, but capital condemnations were not put into execution.

In the cases of qualified and premeditated murder, with grave circumstances, the application of the penalty was very rare. In 1816 there were few and rare cases of application. With those reserves we can conclude that the penalty of death in Tuscany from 1790 to 1808, was not applied. Under the Bourbons, after the French empire, from 1816 to 1831, it was pronounced in a few cases; from 1831 to 1840, it was not inflicted; from 1841 to 1847 it was pronounced once but not inflicted. The necessity of the unanimity of votes after 1847 prepared the way to abolition.

Chief Causes of the Changes about Capital Punishment.

On the Law of 1786.

Peter Leopold was induced to abolish Capital Punishment by the Art. 51 of that law through the following reasons:—"We have seen with horror the "facility with which the penalty of death was decreed by the past legislation for "crimes of no great importance; and having considered that the object of "punishment ought to be the satisfaction of private and of public wrongs; the "correction of criminal members of society and of the State, of which reform one "can never despair; the certainty that criminals of the most grave and atrocious "stamp should not be at liberty to commit new ones, and finally that the "Government in giving the public example of the punishment of crimes and "in serving those objects to which it is principally directed, is always bound "to use the most efficacious means and the most reasonable ways, which ends "are obtained more through the penalty of forced labour than with the penalty "of death, as it serves as a continual example and not as a momentary terror "which often degenerates into compassion; it also takes away the possibility "of committing new crimes and leaves the possible hope of seeing a useful and a "corrected citizen return into society.

"Moreover, if we consider that a well digested legislation would better suit "the more polished customs of the present century and especially of the "Tuscan people, we have come to the determination to abolish it, as we have "abolished it by the present law."

On the Law of 1790.

Men of advanced opinion approved the aforesaid resolution of Peter Leopold, and they rejoiced with Tuscany and her Prince, because the penalty of death perpetuated injustice, or was at least inefficacious. Four years afterwards Peter Leopold called to Vienna, had left a council of regency, that which existed on the 16th of February, 1790. In Tuscany many persons were opposed to the reform of Leopold and many to the religious reforms, the excitement of which was kept up by the bishops. In Pistoja and Prato, the first religious seditions had taken place and grave crimes were often committed. A few days afterwards the conflagration was general, the Florentine people clamoured furiously for the total abrogation of the laws of Leopold, religious as well as economical. In this anarchy the peaceable citizens surrounded the Government, and with the help of the militia restrained the popular fury.

Such was the origin of the law of the 30th of June, 1790; a law of expediency which did not deny the principles of that of 1786, and which was destined only

to repress the effects of anarchy. It was, therefore, neither the work nor the sentiment of Leopold I., it was the result of the fears of timorous ministers who re-established the ancient laws and repudiated the doctrine of free-trade of the same Leopold.

On the Law of 1795.

The French revolution had put the whole of Europe in commotion; the government of terror was at an end; the Republic continued. Italy was agitated under various impressions. Ferdinand III., on succeeding to Leopold I., had been the first and the only one to recognise the French Republic; nevertheless, republican emissaries were proselytising and joined to the revolutionary doctrines those of infidelity; people's minds were frightened and the law of the 30th of August, 1795, was drawn up under that influence to put a barrier to the dangers which were menacing religion and the throne; the penalty of death was re-established for the crimes of treason against Church or State: the crimes of public violence and of premeditated murder, and, almost as a consequence, of the notorious crimes and civil discord were not exempted at the time by this law, then understood to provide for the circumstances.

On the Law of 1816.

At the downfall of Napoleon I. Europe was left in disorder. Immense bodies of troops wandered everywhere, and in Tuscany violent robberies, extortions and murders were frequent. The influence of such a state of things rendered the law of the 22nd of June, 1816, necessary. The legislator, in its preamble, announced it to be an exceptionable remedy and a provisional measure. Some may object that this provisionary state lasted 31 years, and that when the cause had ceased: it may be answered that the Government kept it up because they knew that the Tuscan magistrates were far from being disposed to apply it with severity, because most moderate and almost fearing the conditions in which the country was placed under the empire of the laws of 1790 and 1795.

On the motu-proprio of 1847.

The penalty of death is not stated to have been ever inflicted by the Tuscan tribunals from 1829 to 1838. At this time the legislator, as a preparation to its abolition, ordered by the Art. 231, of a *motu-proprio* of the 2nd of August, 1838, that it would have to be pronounced unanimously. On the 11th of October, 1847, he abolished it because it had already fallen into disuse.

On the Law of 1852.

The causes which, since this abolition brought about its re-establishment, were the political convulsions of 1848-49. The preamble of the 16th of November, 1852, explained that grave and exceptionable circumstances were the causes of the re-establishment of that penalty, as it was the case in 1790, in 1795, and in 1816; it concludes that the principles which directed the legislator twice to abrogate it were not altered; fatal circumstances which troubled the normal state of society caused its being re-instated only as an exception, quietude returning it would disappear again and for ever from the legislation.

SPAIN.

Having minutely studied the questions put to me by Mr. Lockwood, Second Secretary of the British Legation at this Court, I proceed to answer them in the same order in which they were directed to me.

First.

The penal code in vigour in Spain since 1848 only punishes with capital punishment the following crimes and offences:

A. The attempt to destroy the independence or integrity of the State in the different cases marked out by the same code.

B. The homicide of a foreign Monarch residing in Spain.

C. Piracy against Spaniards or against the subjects of any other nation not at war with Spain.

D. The attempt against the life or person of the Monarch or immediate successor to the throne.

E. The consummated or frustrated homicide of the Regent or Regents of the kingdom, Father, Mother, or Consort of the King; Queen Dowager or Infants of Spain.

F. Rebellion against the Government.

It is understood that those are guilty of the crime of rebellion who rise publicly and in open hostility against the Government with any of the following ends:

1. To unthrone the King or deprive him of his personal liberty.
2. To change the legitimate order of succession to the crown, or to impede the conferring the government of the kingdom upon the person to whom it belongs.
3. To depose the Regent or Regency of the kingdom, or to deprive them of their personal liberty.
4. To use or exercise for one's-self, or to deprive the King, Regent, or Regency of the kingdom of the prerogatives conceded to them by the constitution, or to limit the free exercise of such prerogatives.
5. To withdraw the kingdom or part of it, or a body belonging to the land or sea troops, from the allegiance due to the supreme government.
6. To use or exercise for one's-self, or to deprive the Ministers of the crown of their constitutional powers, or to impede or restrict the free exercise of their duties.
7. To impede the carrying out of the elections for Deputies to the *Cortes* throughout the kingdom, or the legitimate meeting of the same.
8. To dissolve the *Cortes*, or to impede the deliberation of any of the co-legislative bodies, or to extort from them any resolution.

G. Parricide.

He commits this crime, who kills his father, mother, or child, whether they be legitimate, illegitimate, or adoptive, or any other of his legitimate ascendents or descendents, or his consort.

H. Homicide if executed under any of the following circumstances:

With treachery.
For a remunatory price or promise.
Through inundation, fire, or poison.
With known premeditation.
With fury, deliberately and inhumanly augmenting the agony of the offended.

I. Castration when purposely executed.

Second.

There is no jury in Spain; one and the same tribunal knows and appreciates the deeds and applies the law; it has not the faculty, but the duty in the application of the punishment to take into consideration the extenuating or aggravating circumstances which concur in the execution or commission of the crime or offence (delito).

Notwithstanding this being the duty of the tribunal with respect to such crimes punished with a sole punishment not admitting of mitigation, as that of death or perpetual confinement (in perpetual chains), which from its nature does not allow of diminution nor amplification, extenuating circumstances properly said are not acceptable.

Some, not all those marked out, are included in this case: those marked with letters A, B, C, D, E, and F, generally are, although with some exceptions which the penal code concretely fixes according to the circumstances of the deed.

The same code extenuates the vigour of this punishment not admitting of mitigation, obliging the tribunals to take into account some of the causes which according to the same, although not sufficient of themselves or isolated to exempt from criminal responsibility, may nevertheless render the spirit or intention of committing the crime doubtful; thus, for example, if the crime result from the commission of a lawful act imprudently executed; the minority of the criminal, even when the tribunal declares that he acted with discernment, if he have not ended his 18th year; and, lastly, if the deed be not entirely excusable for want of any one of the requisites which the penal code accumulatively exacts for the exemption from criminal responsibility, whenever the

greater part of these requisites occur, the tribunal appreciates them according to their worth and importance, and compares them with those which are wanting to exempt such a person from criminal responsibility.

Third.

The most severe punishment, after that of death, which the code imposes is that of perpetual confinement (in perpetual chains).

With respect to such crimes which do not comprehend attenuating circumstances from the nature of the punishment, and in which none of the causes of exemption exist expressed in the preceding answer, and which the tribunals in consequence are obliged to punish with death, the criminal has no other means of freeing himself from such punishment but through the favour or pardon of the Monarch; in the case of his obtaining it, the pain of death is generally substituted by the next inferior one, which is that of perpetual confinement (in perpetual chains), that is to say, if the pardon of the Monarch does not extend to the entire remission of the punishment, which very seldom occurs, or to the commutation to another less severe, which may be any of those comprehended in the code.

With respect to the other crimes and offences (delitos) which on account of their being punishable by two punishments not admitting of mitigation, such as those ranging from perpetual confinement to the pain of death, or by a punishment consisting of such which admit of mitigation and non-mitigation, such as those ranging from temporary confinement to the pain of death, or from temporary to perpetual confinement, the tribunals are obliged to appreciate the extenuating and aggravating circumstances, and the code establishes rules fixing the effects which the first and last must produce in the extenuation or aggravation of the punishments.

For the true understanding of these rules with respect to the crimes punished by the code, by a penalty consisting of punishments either admitting of mitigation or not allowing of mitigation, and consequently with respect to those where the tribunals must enter into the appreciation of the extenuating or aggravating circumstances which may have occurred in the execution or commission of the crime, it is convenient to give an idea of the system established by the code respecting the extension of the punishments.

All punishments admitting of mitigation are divided into three degrees, the highest, middle, and lowest degree, and the same code fixes the extension of each degree. Without this division, without leaving an extensive field to the free judgment of the tribunals, the appreciation of the extenuating and aggravating circumstances could not be carried out in an efficacious and complete manner in the application of the punishments, because the code establishes as a principle that when neither of these circumstances occur the punishment will only be applied in its middle degree.

It is clear that this principle is neither applicable to the crimes punished by a punishment not admitting of mitigation, with respect to which, as beforementioned, extenuating circumstances properly said are not admitted, nor is it applicable in a complete manner to those crimes punished by two punishments not admitting of mitigation, such as that of perpetual confinement to death, because if in these, according to the precept of the same code, any extenuating circumstance arises the tribunals will be obliged to impose the lesser punishment, namely, that of perpetual confinement.

But that principle has complete application to crimes or offences (delitos) which the code punishes with penalties composed of punishments admitting of mitigation or not admitting of mitigation, with respect to which the tribunals must take into account the graduation between the two according to the different cases. When the penalty awarded consists of the most severe of punishments subject to mitigation to the most severe and extreme punishment not admitting mitigation, such as that ranging from temporary confinement to the penalty of death, it is understood that it is a punishment composed of the three degrees, namely, of that of death as the highest, of that of perpetual confinement as the middle, and of that of temporary confinement in its highest degree which is here the lowest; when the punishment is classed under the severest of the punishments subject to mitigation to the lowest of the punishments not admitting of mitigation, such as that ranging from temporary confinement to perpetual confinement, this last is the highest, the middle is the

temporary confinement in its highest degree, and the lowest degree this same punishment (temporary confinement) in its middle degree.

With the preceding explanations it may be easily understood with what punishment the tribunal would have to punish a criminal guilty of a crime punishable with pain of death in the case of extenuating circumstances occurring in the execution of the crime, but I judge it convenient, to facilitate the understanding of this proceeding, to expose it in a more practical light by the application of the following rules which according to the code the tribunals must hold to in the appreciation of the extenuating and aggravating circumstances:

Rule 1st. When extenuating or aggravating circumstances do not arise, the tribunals impose the respective punishment classified under the middle degree.

According to this rule in the first of the cases which I have mentioned, in which the punishment awarded ranges from temporary confinement to the pain of death, the punishment which the tribunals ought to impose would be that of perpetual confinement, since it is the middle degree amongst those; in the second case, in which the punishment ranges from temporary confinement to perpetual confinement, it ought to be that of temporary confinement in its highest degree, which in this case is the middle degree, and the duration of which is from 18 to 20 years according to the same code.

Rule 2d. When a single extenuating circumstance occurs, the tribunal imposes that punishment which is awarded in the lowest degree of punishment.

In the first case mentioned the penalty of temporary confinement in its highest degree would have to be imposed, being the lowest degree between the above penalty and that of death, and in the second, that of temporary confinement in its middle degree would have to be imposed, being the lowest degree ranging between the penalty of temporary confinement and that of perpetual confinement, and the duration of which is from 15 to 17 years.

Rule 3d. When a single aggravating circumstance alone occurs, the tribunals impose the punishment awarded in its highest degree.

In the first of these cases according to this rule the punishment would have to be that of death; in the second, that of perpetual confinement.

Rule 4th. When extenuating and aggravating circumstances both occur, the tribunals will duly weigh the first with the last in order to designate the punishment, balancing the value of both.

Rule 5th. When the extenuating circumstances are two or more and very much qualified, and no aggravating circumstance occurs, the tribunals will impose the penalty next below that designated by the law in the degree they consider just according to the number and importance of the said circumstances.

Rule 6th. Whatever the number and importance of the aggravating circumstances are, the tribunals cannot impose a greater penalty than that penalty in its highest degree pointed out by the law.

Rule 7th. Within the limits of each degree, the tribunals will determine the severity of the penalty in consideration of the number and value of the extenuating and aggravating circumstances, and of the greater or lesser extent of the evil caused by the crime.

I do not apply the last four rules to the cases mentioned in the three first rules, as they depend upon the rational criterion which the tribunals may form of the deeds (nechos) and of the circumstances connected with them, and of which it is not easy to deduce general applications.

Fourth.

The penal code in vigour in Spain since 1848 has reduced the number of crimes which by the preceding legislation were punished with pain of death, but it is not possible, for want of complete statistic data, to say in what measure the mitigation of the penalties may have contributed to the diminution or to the extension of such crimes. It may be held certain that crime in general diminishes in Spain, but without denying the influence which the mitigation of the punishments may have in this diminution, the causes in my opinion which principally determine it are of a more general and complex nature.

There exists a greater degree of enlightenment, more means of work and consequently more comfort and wealth, and the country is furnished with more efficacious means of repressing crime, and all these causes, without excluding the mitigation of the penalties introduced through the code in vigour, undoubtedly concur to diminish crimes and offences.

Fifth.

The pain of death is executed by *garrotting* on a platform during the daytime and publicly in the place destined in general for this purpose, or in that in which the tribunal determines when especial causes render it necessary.

The criminal is conducted to the scaffold in a black tunic (hopa) on horseback, or in a cart, and the public crier publishes in a loud voice the sentence in the places of transit as ordered by the judge.

If the criminal be a regicide or parricide the tunic is yellow, and he wears besides a cap (birrete) of the same colour both covered with red spots.

The body of the executed person remains exposed on the scaffold until one hour before sunset, when it is buried. If his friends or relations beg the body for this purpose it is delivered to them, but the code prohibits the funeral being celebrated with pomp.

Sixth.

In the year 1860 the judicial statistics which I have before me, it results that the pains of death imposed by all the tribunals in Spain, exclusive of the military for crimes punishable by military law, were 35, and only 12 pardons or remissions (gracias) were conceded.

Such are the answers which I am able to give to the six questions which Mr. Lockwood, Second Secretary of the British Legation in this Court, addressed to me, and which I sign on the 18th of September of 1864, in Madrid.

PORTUGAL.

Foreign Office, Lisbon, 10th November 1864.
(Received 16th.)

In reply to the note which you were pleased to address to me on the 8th of September last, requesting for information with respect to the law relating to crimes punishable with death in Portugal, I have the honour to transmit herewith the inclosed copy of a despatch, which I have received from the Minister of Justice, wherein he furnishes the information which he was able to obtain with respect to each of the queries contained in your note above mentioned.

I forward likewise a printed copy of the Report and Project of Law to which His Excellency alludes, and of which you will make the use that you may think proper.

I renew, &c.

Sir Arthur C. Magenis, &c. &c.

(Signed) Duke of Loulé.

Department of Ecclesiastical Affairs and of Justice.

General direction of the Affairs of Justice, 2nd Section.

Most Illustrious and Excellent Sir,

I had the honour to receive Your Excellency's despatch of the 9th instant, and inclosed therein a copy of the note addressed to you on the 8th of that month by Her Britannic Majesty's Minister at this court, requesting information upon several points with respect to the Portuguese Law relating to crimes punishable with death, which information is required as soon as possible by the Committee appointed in England to report upon that punishment, and which is reduced in that note to six precise queries. And as Your Excellency expresses the wish of being enabled to comply without delay with the request for that information, made to you by Her Britannic Majesty's Minister, I have the honour to forward the same to your Excellency for that purpose, with as much detail as the shortness of time will allow, and also with reference to each of the queries above referred to.

1st. What crimes, if any, are punishable with death by the law of Portugal?

The punishment of death was abolished in Portugal for all political crimes, in virtue of the 16th Article of the Additional Act to the Constitutional Charter of the Kingdom, and dated the 5th of July 1852; but, in addition to those cases in which the military laws impose that punishment for military crimes, the Penal Code of the 10th of December 1852, at present in force, likewise prescribes the infliction of that punishment for some civil crimes. Thus it is laid down in the 141st Article of the aforesaid Code, that every Portuguese subject that shall take up arms against his native country, under the flag of any foreign nation, provided he shall not have been in the service of that nation with the authorization of the government before the declaration of hostilities, shall be condemned to that same punishment. In the single section of the 143rd Article it is likewise laid down that every minister of state who may have been bribed by gifts or promises, or any diplomatic agent who may have been charged with any affairs with any foreign power, in virtue of his office, and bribed in the same manner, and shall act in concert with any such power for the purpose of declaring war against Portugal, or shall induce or attempt to induce it to do so, carrying on with the same or with its agents any verbal or written communications, or entering into any negotiations, or engaging in any intrigue, or endeavouring to furnish the means by acts of any kind; or shall assist or endeavour to assist any foreign power at war with this country in the execution of hostile measures against the state, carrying on a correspondence with the same or with its agents, either directly or through the intervention of any other person in order to facilitate the execution of the same, or making use of any means or committing any acts intended for that same object, provided in any of the cases above mentioned either war or hostilities shall have actually ensued, shall be condemned to death. In the 1st section of the 162nd Article, that same punishment is likewise imposed upon any person who shall commit the crime of piracy, if the violence which may have accompanied the crime shall have caused the death of any person. In the 163rd Article it is laid down that any attempt upon the life of the reigning king or queen or of the next heir to the crown, as well as any attempted or actual assassination of the regent or regents of the kingdom; and in the 166th Article the attempted or actual assassination of any member of the king's family shall be punished with death. In the 1st section of the 238th Article it is laid down that any one who shall in any criminal case, or with respect to the essential circumstances of the fact which may form the subject of accusation, bear false witness against the accused, shall be condemned to the same punishment to which the latter may have been condemned, and which he may have undergone, provided that punishment shall have been greater than hard labour for a certain period, whence it follows that if under these circumstances the accused shall have been condemned to the punishment of death and shall have undergone that punishment, the person thus guilty of perjury must also be condemned to that same punishment. In the 351st Article all wilful murder, whenever accompanied with any of the following circumstances, is likewise punished with death. 1. Premeditation. 2. Torture or any other act of cruelty for the purpose of increasing the sufferings of the person murdered. 3. Whenever the crime is intended for the purpose of preparing, facilitating, or executing any other crime or insuring its impunity. 4. Whenever it shall have been preceded, accompanied, or followed by any other crime for which the corresponding punishment shall be greater than three years imprisonment. In the 353rd Article the same punishment is imposed upon the crime of poisoning, in the 355th Article, upon the crime of parricide, all wilful murder of either father or mother, either legitimate or natural, or of any legitimate progenitor, being considered as such; in the 356th Article, upon that of child-murder, either in the act of the birth or within eight days after it, except in case it shall have been committed either by the mother to conceal her dishonour, or by her parents in order to conceal the dishonour of the mother. In the 433rd Article upon that of theft either committed or attempted when coupled with the crime of homicide; and, finally, in the 469th Article, upon that of arson, which may have caused the death of any person that might happen to be in the place when it was set on fire.

2. When a person is found guilty of a capital offence is there any power in the jury or the court to reduce the punishment below that of death by finding extenuating circumstances, and if so is this power frequently exercised?

In this country the jury do not impose any punishment; they merely declare whether the facts upon which it is the duty of the judge or court to impose them in accordance with the laws are really proved or not. Whenever the jury declare that extenuating circumstances have been proved, both the judges and the Courts of Justice are bound to apply to the crime the punishment prescribed by the law, with special and express reference to those circumstances; but should the law not have considered them as such for the purpose of fixing the corresponding punishment, it is laid down in the 80th and 81st Articles of the Penal Code above quoted that, according to the greater or lesser influence of those circumstances upon the guilt of the criminal, the punishment of death shall be substituted by either hard labour, imprisonment, or transportation for life.

3rd. What is the most severe punishment, next to that of death, by the law of Portugal; and in cases where the sentence of death is reduced by finding extenuating circumstances, or commuted by the Government to such lesser punishment, is the latter invariably carried out in full? If not, to what extent is it mitigated?

The most severe punishment next to that of death is that of hard labour for life, as may be seen from the 29th and 47th articles of the above Code. In those cases where a punishment lesser than that of death has been imposed by a judicial sentence upon a capital crime, owing to extenuating circumstances, that lesser punishment is not always fully carried into execution, because even that is sometimes mitigated by the modifying power (*poder moderador*); and likewise a lesser punishment, into which that of death may have been commuted by that power, is not invariably and fully carried out into execution, because the aforesaid power, in the exercise of its right of pardoning, and upon reasonable grounds, does sometimes, though rarely, grant a further commutation.

4th. Have there been any changes of late years in the law of Portugal by which certain crimes formerly capital have now ceased to be so? If so, have those crimes increased, and is their increase, if any, attributed to the diminution of the punishment?

Since the publication (10th December 1852) of the Penal Code which is at present in force, and which limited to a great extent the number of crimes which were punishable with death in virtue of the ordinances (*ordenacao*) in the fifth book, and of several laws not inserted in the codes (*extravagantes*) which constituted our penal legislation before the publication of that code, no change of this kind has taken place in our laws. And with respect to the influence upon the increase or diminution of capital crimes on account of the non-execution of the punishment of death in this country during the last 18 years, and also with reference to other important points upon this subject of so much consequence, it appears to me that I cannot comply more fully with your Excellency's wishes than by transmitting, as I now have the honour to do, the inclosed copy of the Report and Project of Law, which I laid before the Cortes in the sitting of the 11th of January of this year, together with the Report and Project presented by the Committee of the Chamber upon Legislation, with the opinions given by the Navy and War Committees with respect to that project of law.

5th. In what manner is the sentence of death executed, and does the execution take place in public or private?

The manner in which and the place where the punishment of death is to be carried into execution, in case it might unfortunately have to be again put in force in this country, are laid down in the 91st article of the Penal Code, in which it is stated that it shall be carried into execution on the gallows, in a public place of the city or village where the sentence may have been pronounced, or of the district where the crime may have been committed, according to the tenor of the sentence, and duly preceded by and accompanied with all the acts

and formalities that may be required in order to insure the greatest degree of publicity.

6th. In what proportion of capital convictions is the punishment of death usually reduced by the clemency of the Head of the State (modifying power—*poder moderador*) to some minor infliction?

As during the last 18 years not a single sentence of death has been carried into execution, it follows from this fact that as many as have been pronounced have either been commuted, or the execution of the same has been suspended, or the accusations have been annulled, on account of the death of the criminals, owing to some other cause.

Such is the information which I have been able to collect within so brief a space of time in answer to the queries drawn up by Her Britannic Majesty's Minister in the note of which a copy was inclosed in your Excellency's despatch, and which I have the honour to lay before your Excellency in reply to that despatch, so that you may be able to avail yourself of the same in the manner in which you may think it expedient.

God preserve your Excellency.

Department of Ecclesiastical Affairs and of Justice, September 20, 1864.

To the most Illustrious and Excellent Sir, the Minister and Secretary of State for Foreign Affairs.

(Signed) Gaspar Pereira da Silva.

True copy.

Department of Foreign Affairs, November 10, 1864.

(Signed) Emilis Achille Monteverde.

Translation from the Portuguese.

Gentlemen,

Your Committee of Legislation has had before it the proposed law No. 6 K, which was brought into the Chamber by the Minister and Secretary of State for the Affairs of Justice, and was likewise signed by the Minister of War, and of the Navy and Colonies, for the suppression of the punishment of death in all civil crimes, and generally in all military crimes. It is well known that in all political crimes such punishments have been already abolished by the 16th Article of the additional Act of the 5th July 1852. Therefore, by the adoption of the law at present proposed, the punishment of death will be abolished for all crimes, whatever may be their nature or classification, with the exception of one single and extremely rare case.

Intimately convinced of the very great importance of the subject, of its most deep interest to mankind, of the immense responsibility of either favourably receiving or of rejecting such a measure, your Committee, weighing the opinions of philosophers with the doctrines of legal writers, moderating feeling by judgment, and testing principles by experience, without yielding simply to the desire of innovations which might be dangerous, without respecting prejudices which might be unfounded, has devoted itself with all its faculties to study and to solve this vital, this most vital question, which is one, not of a political party, not even of a civilized people only, but of all the human race, and for all ages. Your Committee has done what it was incumbent upon it to do, and what your confidence in electing its members required of them as a duty. To your enlightened intelligence, and to your definitive vote, we have now to submit the result of our deliberate reflections and long discussion.

Among the points of the highest importance which are contained in the proposed law, the first and the chief, that namely of the abolition of the punishment of death, is the one which first and most deeply occupied the vigilance of your Committee. The punishment of death is a social fact of all ages and of all nations; it is the extreme chastisement of extreme guilt; it is the complete annihilation of the criminal element; it is the supreme right of society for the purpose of maintaining society itself in security; it is the absolute satisfaction of social justice when that justice has been outraged or contemned. Such, amongst others, are the principal arguments of its defenders.

But whatever may be the historical consideration of the social facts of all ages and of all nations, can we look upon them as forming an incontrovertible principle of right? No: and history itself shrinks from affirming this to be a truth. No; because slavery was likewise a social fact of all ages and of all nations.

But can death inflicted evidently by force, by a musket, as a punishment, be the extreme chastisement of extreme guilt? No; because death is applied to the parricide, to the fratricide, to infanticide, to wilful murder, which are distinct and different crimes, whilst in order to preserve its proportionate position as an exceptional and unchangable punishment, it ought only to be pronounced against one single crime. As the maximum of chastisement, it only could perhaps be inflicted on one who should realize the desire of Nero by cutting off at one blow the heads of all mankind, because he would thus have committed the maximum of guilt.

Can it, however, be regarded as the complete annihilation of the criminal element? Without a doubt it can; and for this very reason it is blindly absurd. It annihilates the whole man, instead of annihilating vice or the criminal element in him. Instead of correcting his reason and his feelings it mutilates his body, as if the body were the source of guilty impulses. It puts out the fire of life, because it does not choose to purify its bloodstained flame. Finally, it extinguishes too much, it strikes at too much, because physically, morally, and intellectually, there is no human being absolutely and entirely criminal, and the punishment of death includes the whole man.

And also, can it be the supreme right of society for the purpose of maintaining society itself in security? No one can give credit to this pretension. Society, with its millions of individuals, with its tribunals and courts of justice, with its fetters and fortresses, with its numerous standing armies, with its police, with its infinite variety of means of action and of strength, cannot tremble for its own security on account of the existence of this or that criminal, however audacious and however villanous he may be. One against many millions is not rashness, it is absurdity; many millions against one is not cowardice, it is crime. It would be ridiculous, if it were not first disgusting, that society should have such a right as this.

Finally, can the punishment of death be the absolute satisfaction of social justice? This is impossible. The idea of murder, whether legal or illegal, is repugnant to the idea of justice. Justice is a principle of life, of progress, of social harmony, but never one of death.

Be it, however, as may please the defenders of the punishment of death, and let them pile up arguments upon arguments, if they are in possession thereof, there is one point which they will never be able to demonstrate in such a way as to convince even the most untutored minds, namely, that there exists in this sanguinary action the least of the characteristics required to constitute punishment, truly so called. Before all things, and above all things, punishment ought to be reparable, seeing that absolute infallibility cannot be predicated as a quality inherent in human nature. The judge may err, and does err; the jury may err, and does err; evidence may err, and does err; and it would be quite enough that there should only be liability to err, for it to be never right to condemn any one to the punishment of death, that is, to a punishment which is completely irreparable. The legal murder of the innocent has been many times repeated. Sovereign equity and infinite impeccability are not essential inborn qualities in any human tribunal.

Still further; let us grant that the person condemned is really criminal; what does society do when it slaughters him? Does it perchance avenge itself? If it avenges itself, ought it not then to punish him with death who, having been offended, waits, spies after, and pursues his offender for months or for years, in order to wrench cruelly from him his life? for society likewise avenges itself in cold blood, and even with premeditated ostentation. The law which assassinates is the evangelist of assassination. Does it seek, peradventure, with this apparatus of executions, to intimidate all similar criminals? If so, then it tramples under foot the fundamental principle that a man in society is not a means for the sake of others, but an end for his own sake; that a man, however perverse, however stupid, however imperfect he may be, retains always the primordial conditions and the absolute rights of his nature.

Let it be said with all candour that what society does when it assassinates a man is to assassinate the possibility of his regeneration, and to assassinate the probability of his repentance. It extinguishes hope, that ray of the Divinity; it prevents expiation, that virtue of humanity.

As far as relates to the legitimacy of the punishment of death, and as to its abolition in Portugal being adapted by custom, or being perilous to the public safety, so much has been said, and with such good proofs, in the recital of the proposed law, that we turn aside from the inglorious task of copyists. Arguments and remarks, statistical data and categorical reasonings, are to be found therein in more than sufficient plenty to preserve us from any desire to add to them.

The abolition of the punishment of death having then, upon the above and upon other grounds, been favourably entertained by your Committee, the discussion went on to the subject of the exception to this most holy principle, so far as regards the single hypothesis of crimes committed during or in the act of war between Portugal and any foreign nation by individuals who form a part either of the army or of the fleet. On this point some of us were moved by the tender love we bear towards our country; others by the necessity of preserving military discipline from any even the slightest shock; others by the improbability of our having a war with foreign nations; and others again, by the hope that in case of these perilous extremities, no one would be found capable of betraying his brethren, or of staining by crime the national banner. After a lengthened discussion the exception has been admitted.

In truth, in conjunctures of such great peril, military offence assumes the most serious gravity. The life of a whole army depends sometimes upon a single individual who might betray it, and the self-government, the glory, the very name of the nation, may depend upon that army. A fortress or a city, taken by storm, may be sacked and destroyed, and have its garrison put to death, and a single soldier may open a way to this calamity of fire and of sword and of blood.

The abolition of the punishment of death having thus been agreed to for all and every crime, however horrible it may appear, with the above-mentioned sole and exclusive exception, the discussion went on with the proposed law to the practical measures to be employed in commutation. The punishment of public labour for life in Eastern Africa has been the punishment we have preferred substituting for that of death. This preference was not, however, accorded without the most lively reluctance.

The punishment of public labour is pertinaciously opposed at the present day by the best writers upon punishments. They call it immoral and derogatory to the dignity of man. Its perpetuity (*i.e.* its being for life) exaggerates their repugnance to it. Punishments for life make the culprit unfit to receive regenerating, christian, holy impulses, unfit for remorse and for the sublime virtue of suffering. The fact that this public labour is to be in Eastern Africa, in plague-stricken and deadly localities, doubles its cruelty.

Nevertheless, these three very strong arguments against this punishment, arguments of which your Committee unanimously acknowledged the force, had to be confronted with other arguments for a decision. The first was the impossibility of remodelling, on the occasion of the present proposed law, the whole of our penal code, an alternative to which the extinction of this punishment would irremediably have brought us. The second consisted in the well-known and current fact that public labour, as a punishment, is no longer carried into effect in the midst of our cities, as it used to happen only a few years ago with the condemned prisoners in fetters and chains (and as may still be seen at the present day in Switzerland, with the criminals chained by the neck), who used not unfrequently to insult with unbecoming expressions the honest citizens who were passing by.

It is indisputable that, to set against these arguments partially, your Committee has for a long time had before it for its examination and opinion the project of a revision of the penal code, and that this punishment does not appear therein. We use the word "partially" for this reason, viz., that, as it were, the self-same consideration which stops us before the penal code is able to be put forward in relation to the project of revision. It is true that the punishment of public labour is not mentioned in this project, but the graduated

scale of punishments does not agree entirely with that of the law at present proposed, and therefore it would be equally indispensable to remodel the whole, and this is impossible. But besides this, the project of revision, which, whatever may be its defects, is indisputably the most advanced theoretical work of this class, has taken, in accordance with the dictates of philosophy and with the counsels of experience, for its almost exclusive punishment, the truly rational, reparable, divisible, moralizing punishment, that of cellular imprisonment, and much as we may blush in confessing the fact, we do not possess the necessary prisons. In consequence of this circumstance, for the present, and as far as we are concerned, the project cannot obtain more than to be looked upon as a national theory.

In this place your Committee deems that it is not allowable for it to omit to call down all your intelligence, patriotism, good feeling, and even charity upon the melancholy, immoral, and barbarous state of our prisons. The spectacle which, in this point of view, we offer to all civilized nations is more than deplorable and disgusting. It is superfluous to remind you that the public authorities neither instruct, nor moralize, nor regenerate, nor clothe, nor feed the prisoners. They are provided for in great measure by the "Misericordias," that most christian institute, and by the evangelical sentiments of private compassion. Also, there is no organization of employment; the unhappy beings vegetate in complete inaction or lay schemes for future crimes. The buildings unite all the defects which the science of health protests against, and which the unphilosophical penal ideas of former ages thought needful for a destructive repression. In a word, our present prisons, considered by the tranquil light of reason, are barely to be classed as licensed hot-beds of malefactors.

We may say with an illustrious former minister of the affairs of justice, his Excellency Alberto Antonio de Moraes Carvalho, in the recital which precedes his proposal for the reform of our prisons:—

"The state of the prisons in Portugal, notwithstanding some ameliorations "which have been introduced into them, is such as to claim imperatively the "attention of the public authorities. He who knows that in our prisons you "find mingled together in promiscuous confusion, youths and adults, arrested "and suspected persons, men accused of, and men who have been condemned "for various crimes to different punishments; he who has been into those "enclosures in which an infected atmosphere wears away and enervates the "bodily strength, and where a perpetual school of immorality leads innocence "astray, wipes out all vestiges of honour and delicacy, brings down mere "want of reflection to the level of utter perversity, and puts an end to every "hope of future amendment, he ought not to adjourn to any future date the "solution of a question which lays hold of social well being, humanity, and "morality."

This was written on the 26th of January 1861; and notwithstanding the fact that the evil has gone on growing worse every day, we have as yet done nothing, resolved nothing, in a question of such momentous importance!

It appears, however, to be already time, and more than time, to bring such cruel proceedings to an end. Without at all turning away our thoughts, our eyes, or our exertions from the indispensable or advantageous and material ameliorations, on which we have been labouring without interruption for many years past, let us at the same time turn for a while to this most urgent moral amelioration which can no longer admit of procrastination. The chamber which heartily takes up this most important social question, and, even at some sacrifice of the public resources, votes the necessary means for the regeneration of criminals, will fill one of the most splendid pages of parliamentary history, will interpret and verify in the most praiseworthy manner possible the 20th paragraph of the 145th Article of our constitutional charter. Would to God that our expressions on this subject might be a prediction to be speedily realized!

At any rate, before we have carried into effect this entire change in our prisons, to reject absolutely and in the whole territory of Portugal, the punishment of public labour, and to legislate almost exclusively for the punishment of imprisonment, is open to the suspicion of being, if not unjust at least useless. The culprit would be condemned to attend without intermission the

most horrible school of crime; an element would be withdrawn from the graduated scale of punishment; and, as we have already pointed out, the whole economy of the penal code would be disturbed. It is fitting to state that this self-same consideration has made us approve the received distinction between Eastern and Western Africa, although your Committee is of course aware that this distinction is not in rigorously exact proportion to the greater or less hurtfulness of the climate.

The infliction of punishment for life has likewise been accepted as a grievous, although indeed an exceptional necessity. It is most justly proposed to bring this to an end in the case of all offences which up to the present time were condemned thereto, and it remains only reserved for those which hitherto were visited with capital punishment. It was needful, under the existing conditions of our penal laws, to take care to make clearly evident the difference between the crimes heretofore chastised by the penal code with labour for life and those which it visited with death. We have arrived at the great fact of respecting the inviolability of human life; it does not appear that there is any urgent propriety to carry us at present beyond this point. In lieu of life, that gift of God, left to man for repentence, we withdraw physical liberty from those whom society, judging by their past perversity, considers to be objects of its just apprehension. In a word, labour for life will henceforth be incurred only by parricides, fratricides, and infanticides, and by those who may have commited wilful homicide with aggravating circumstances.

In the four paragraphs of the second article of the project which we have the honour to submit to your deliberate decision, the punishment of public labour for life in Eastern Africa is modified to meet the circumstances of various individual cases. The same system is to be found with slight alterations in the penal code, and care has been taken to maintain the same graduated scale, and to elucidate only a few incidental points.

Your Committee has felt the greatest satisfaction in agreeing to the substitution of a maximum term of 20 years in all cases in which the punishment has hitherto been for life. The well drawn up recital, which prefaces the law proposed by the Government, says upon the subject of this important substitution:—

"I believe that the repressive power of punishment will not be at all lessened "by this substitution. On the one hand, the maximum thus fixed, viz., 20 "years, is sufficient to bring the criminal either to the ordinary limits of "human life, or at least to an age at which the strength for guilty purposes "is broken down; on the other hand, it has been constantly remarked that "nothing is so favourable to impunity as the excessive rigour of punish-"ments."

Setting aside all the other advantages which the writers upon penal questions have shown to be offered by temporary punishments, the above quotation contains truths so universally admitted as to render any addition of ours quite unnecessary.

Punishments for life having been reduced to the maximum of 20 years, it is at once perceived to be in accordance with justice to reduce in like manner the existing maximum of 15 years to 10 years, as it is proposed to do. And in considering the fifth and sixth articles of the project, we may further say, on the subject of the consequences deduced from these mitigations of punishment, adopting the words of the recital,—

"The result of all this is a singular facility in the system of the aggravation "and mitigation of punishments in cases which invole aggravating or ex-"tenuating circumstances, since the graduated scale can always be applied "within the same category of punishment, and I deem this to be exceedingly "preferable to the system which our penal code was found to be obliged to "admit, and whereby the judge is allowed to commute punishments of one "kind into others af a distinct nature, and tribunals have at their disposal an "arbitrary power, which, although necessary up to a certain point, is, when "conferred upon them with such latitude, a power that has been, and cannot "fail to be, a source of the greatest irregularity."

The provision which is added to the seventh article of the project has been thought indispensable. The proposal of the Government gives relief to all

the unfortunate beings who may have fallen by their criminal acts into any of the more heavy punishments, and it modifies their severity by diminishing the space of time to be suffered in public labour, in prison, or in exile; it also takes into account, in cases of guilt which have till now been punished by a sentence for life, the circumstance of the culprits being either sexagenarians, or in ill health, or women, or children under seventeen years of age, and it shortens their term of punishment in a fitting proportion to the graduated scale which is established in the existing code. It has, however, omitted to provide for the possible case of the commission of any crime, which falls under the heavier categories of punishments, by children under fourteen years of age who may appear to have acted with discernment. In order to repair this omission, the maximum duration of the time of punishment in these cases has to be reduced in the project from ten years to seven years. Such are the dictates of relative justice, such are the requirements of equity.

Nor, without doubt, are solid arguments wanting in support of this view; for if there be any punishment which we ought always to shrink from making too severe, it is that which has to fall upon an individual, whether male or female, who is not yet fourteen years old. At this early age it is extremely difficult to find out the real intention, and to ascertain clearly the degree of discernment. The most sagacious judge will in such cases be not unfrequently mistaken. Besides this, it is very nearly always improbable that the culprit can at such a tender age have any full perception of the extent and consequences of the act which he commits; neither reason, nor study, nor experience can be supposed to exist in the child to so high a degree. And, moreover, at such an age regeneration appears to be more rapid and more efficacious. There are as yet no fixed, unchangeable tendencies either to ingrained perversity or to extreme virtue. It is the period of life which is subject to the greatest changes.

But above all, to pass sentences at so immature an age to a long punishment on children under fourteen amongst us in this country, might be held, and that, perhaps, without any grievous impertinence, to be a frightful immorality committed by the law. We might be pained by hearing that such a course is adopted by all polished nations; but we should, nevertheless, have to take into account here a consideration of the weightiest character: those nations possess numerous, ample, and well-directed agrarian colonies, at which the young criminals are made to work out their time, are instructed, grow strong and moral, and are reformed into good citizens; while we, on the contrary, shut them up in our prisons, enervating them with viciousness, mingling them with the vilest wretches, adding to the errors of their young lives lessons in vice, examples of crime, every stimulus to iniquity. It is admitted that already a trial is being made to take care of some in one of the penal colonies. The Committee is glad of this, and applauds the attempt; but inasmuch as we have not such colonies in any proportion to the necessities of the case, it remains clear that sentences to a long term of years would occasion the evils which we have pointed out.

Before concluding, and in order that we may not set ourselves down as lower than we really are in presence of this our state of penury in penal matters, it may probably be not inopportune to confess that in all this negligence of ours we find a great protection in the gentleness of the national character, in the good dispositions of our population, even in the lowest classes. This excuse, however good in the presence of foreigners, ought not to be turned into a motive for any prolongation of our carelessness.

Since in political liberty we are the first of European nations, let us strive not to be the last in all great social improvements.

In conclusion, this proposed law comprises two supreme principles of penal philosophy: the abolition of the punishment of death for any crime whatever, with the single exception of military offences committed in time of war with a foreign power; and the extinction of all sentences for life, with, again, the single exception of those crimes on which the existing law inflicts the sacrifice of blood. It is an immense progress!

We therefore submit to your profound deliberation the following

PROJECT OF LAW.

Article One.

The punishment of death is abolished for any crime whatever.

Single paragraph.—Are excepted the military crimes, subjected to this punishment by military law, which may be committed during or in the act of war between Portugal and any foreign nation by individuals belonging to the army or navy.

Article Two.

To the crimes to which the punishment of death was applicable by the legislation at present in force, there shall be applied that of public labour for life in Eastern Africa.

First paragraph.—This punishment is not susceptible of aggravation or of reduction.

Second paragraph.—This punishment shall not in any case be applied to females, to persons above sixty years old, or to those who, after having been examined by medical men, are found to have such an infirmity as not to be capable of working at public labour. In these cases the punishment established in this article shall be changed into that of perpetual banishment to Eastern Africa, together with imprisonment, either with or without labour, for the whole duration of life at the place of exile.

Third paragraph.—This change of punishment shall be made in the judgment itself, if the facts on which it is founded already exist at the time; or it shall be made afterwards by decision of the judge in whose district the culprit resides, if the sixty years of age are completed, or if the illness takes place during the undergoing of the sentence pronounced.

Fourth paragraph.—Individuals under seventeen years of age, who, by the provisions of the penal code, were subjected to the punishment of imprisonment for life with labour instead of that of death, shall be sentenced to the punishment of perpetual banishment with aggravation.

Article Three.

To the crimes to which any of the punishments of public labour or imprisonment or banishment were applicable for life by the said code, the same punishments shall be applicable, but only for a time, and that not exceeding the term of twenty years.

First paragraph.—The punishment of expulsion from the kingdom for life shall continue to be applied according to the manner and in the cases established in the penal code.

Second paragraph.—The loss of political rights shall continue to be applied in the same manner, whether as a punishment or as the effect of condemnations to a term of years or for life, in the cases in which these punishments now exist.

Article Four.

In the cases in which the penal code ordered the application of punishment for a term of years, and fixed the maximum thereof at fifteen years, the maximum term is now in the same manner reduced to ten years.

Article Five.

Punishments for a term, whether of ten or of twenty years, shall not be able to be aggravated in respect of their duration. When, however, there may be cause for an aggravation of the said punishments, the following rules have to be observed:—

First paragraph.—The punishments of public labour and of imprisonment may be aggravated by being applied beyond the seas.

Second paragraph.—The punishment of banishment may be aggravated as follows:—

1st. When it is for Eastern Africa, it may be aggravated by imprisonment at the place of banishment, but this imprisonment shall not be prolonged beyond the term of the sentence of banishment.

2nd. When it is for Western Africa, it may be aggravated by being changed to the East.

3rd. When it is for India, it may be aggravated by being changed to Western Africa.

Article Six.

The extenuation of punishments shall take place according to the following terms:—

First paragraph.—The punishment of the loss of political rights for life shall be able to be commuted into the suspension of their exercise for a term of ten to twenty years.

Second paragraph.—The punishment of expulsion from the kingdon for life shall be able to be commuted into expulsion for a time of from ten to twenty years.

Third paragraph.—The punishments for terms of twenty years shall be able to be reduced in their duration as low as ten years.

Fourth paragraph.—The duration of punishments for terms of ten years shall be able to be reduced to the minimum of three years.

Article Seven.

The individual less than fourteen years old who commits any crime which is visited by the existing penal code with any of the heavier punishments, having done the action with discernment, shall be condemned to prison, with or without labour, for a term that may not exceed seven years.

Article Eight.

All other punishments shall continue to be applied in accordance with the manner established in the existing legislation.

Article Nine.

The Government is authorized to alter, so as to bring into harmony with this present law, those articles of the penal code which shall be found to be modified hereby.

Article Ten.

All legislation to the contrary is hereby revoked.

Legislative Committee Room, 5th April 1864.

Here follow the signatures, viz.:—

José de Oliveira Baptista, *President.*
José Luciano de Castro.*
Joaquim Antonio de Calca e Pina.
Bernardo de Albuquerque e Amaral.
José Maria da Costa e Silvia.*
Pedro Augusto Monteiro Castello Branco.*
Joaõ Rodrigues da Cunha Aragaõ Mascarenhas.
Albino Augusto Garcia de Lima.
Annibal Alvares da Silva.
Antonio Carlos de Maia.
Antonio Ayres de Gonvea, *Reporter.*

In a minority on Art. I. § 1.

* *With a declaration.*

Gentlemen,

Your Committee on the Navy has examined the proposed law presented by the Government for the abolition of the punishment of death.

The Committee fulfils an honourable and agreeable duty in bringing its vote to concur in the approval of a measure by which our legislature adopts for its own so holy and imperishable a principle as that of respect to the natural right which every man possesses to the preservation of his existence, as the most sacred of all the rights which a civilized nation has to protect and to secure to its citizens.

Your Committee feels that circumstances beyond its control necessitated the exception of the case of war with a foreign country; but this being thus required for the safety of the majority, as well as for the preservation of the national independence, the Committee decides upon giving on this point also its approval to the proposal of the Government.

Navy Committee Room, 7th April 1864.

Here follow the signatures, viz. :—

Dé Luiz da Camara Leme.
Joaquim José Rodrigues da Camara.
Fernando de Magalhaēs Villas Boas.
Joaquim José Goncalves de Matos Correia.
Antonio Maria Barreiro Arrobas, *Reporter*.
Levy Maria Jordaõ, (*with a declaration.*)

The Committee of War forwards, together with its opinion, to the illustrious Committee of Legislation, the law proposed by the Government, No. 6 K., of which the object is the suppression of the punishment of death in all civil crimes, and also in like manner in military crimes, excepting the case of those which may be committed, during or in act of war between Portugal and any foreign nation, by individuals who belong to the army or to the fleet.

The Committee of War, rejoicing to see that the punishment of death, which, for nearly twenty years has been *de facto* extinct amongst us, is going to be finally expunged from our laws, cannot but at the same time deplore the exception.

Considering, however, that amongst the military crimes which in time of war and before a foreign enemy may possibly be committed by individuals belonging to the army, there are some so hateful in their nature, and of an importance so exceptional, that they would render the existence of an army impossible, and would imperil the national independence, and demand therefore a punishment in like manner exceptional, the Committee acknowledges (although it does not say so without reluctance) that for these crimes, but for these alone, it would be at the least imprudent to withdraw at present from the military penal law the most salutary of its effects, the effect of terror, which perhaps is alone able to prevent the crimes in question.

Therefore your Committee is of opinion that the proposal of the Government No. 6 K. ought to be approved.

War Committee Room, 7th April 1864.

Here follow the signatures, viz. :—

D. Luiz da Camara Leme.
Joaõ Nepomuceno de Macedo.
Fernando de Magalhaēs Villas Boas.
Francisco Maria da Cunha.

The minority of the Committee of War finding itself under the obligation to express formally its opinion respecting the law proposed by the Government with a view to the abolition of capital punishment, declares in the first place that it takes great pleasure in the assurance offered to it by the Government itself to the effect that the opportune moment has arrived for the triumph of rational and absolute right over our existing laws, and over those of the majority of nations, by the suppression of a punishment which on the common principles of right is unjust, because it is unnecesary, and can be changed for others in a useful and justifiable manner.

The recital, which prefaces the proposed law, affirms upon the strength of numerous facts, that the abolition in question has in truth preceded the law, and that the law, instead of introducing, will do nothing but sanction the custom already in practice. This argument, and the eloquence of that recital, would carry along with them even the most confused minds, were it not that fortunately the idea adopted in the proposed law is already the expression of Portuguese feeling, and, in the words of a distinguished foreign writer on cri[illegible] *the opinion of modern times, the voice of religion, the voice of all mankind.*

But as abstract truths, however full they may be of philosophy and humanity, can still not be received into the domain of social utility without the field having been prepared for them by good policy, and the mode of their adoption having been guarranteed by due precaution, so is there much to praise in the verifications and statistics collected by the Government, as to all the favourable circumstances which it considers to exist for the promulgation of so important a measure, and in the certainty which it gives us of the great moral improvements which are to lead to good results of this measure, and lastly, in the care it takes to fill up the blank which otherwise would be left in our scale of punishments by the suppression in question.

Paying so far all homage to the principal theme of the proposed law, the minority of the Committee will state next its appreciation of the "*slight mortification*" to which the Government refers in its recital, and which is the preservation in military justice of the punishment of death for crimes committed during or in the act of war against foreigners. The minority of the Committee, which readily acknowledging in this exception one of those precautions which the safety of society demanded in the transition from one system to another, considers it to be most prudent indeed, but incomplete, because it omits the consideration of certain possible cases in which, while yet in the midst of peace, public order and the safety of the army itself may be seriously compromised.

It is possible that the philosophers, the publicists, and the political economists, those missionaries of a more complete civilization, may some day or other attain to the abolition of armies. It is possible that the above-mentioned missionaries may some day succeed in proscribing that war, which at present time takes in a different guise the place of the ancient judgment of God, which oftentimes founds right upon force, and in which, likewise, the justice of nations is sometimes oppressed; but those cannot be greatly in error who affirm that this vast moral victory is at any rate extremely distant. As long then as a permanent army is necessary, its existence will have always to be ruled by conditions very different from those which govern society in general. To men who have frequently to expose their lives in the defence of the independence of their country, or in the maintenance of order at home; to men called to do their duty not by any decided vocation of their own minds, but by the blind, legal lottery of the conscription; to men brought together in the army, with the most different temperaments, propensities, and education; to men who have inexorably to conform to special and indispensable conditions, the very opposites of those which are so sweetly met with in families and in society; to men from whom is required a complete submission of the will and a readiness in meeting and in conquering danger without reflection or previous discussion, to these men the only voice which can speak with advantage is that of a discipline contained in brief and imperative orders, that of a code which makes itself respected by a just and energetic penalty, a code which, as the reason and the observation of all countries have proved, must be characterized by exemplary strickness and intimidation.

And in truth, however we may and ought to hope for repentance and reformation in civil culprits, yet in the most dangerous violation of military law, and inasmuch as this interests the security of the State and the preservation of the army, there is neither any way nor any time to wait for such amendments, and the utility of punishment has to consist chiefly in the great vividness of the impression which it produces on the imagination; but this impression can only result from the infliction of the maximum punishment in question, and no one who has studied the physiology of armies will say that capital punishment ought not to be inflicted even in time of peace upon crimes of military revolt, insubordination, and military sedition; nor will this assertion appear to be exaggerated to those who peruse the military penal codes of the most civilized and most humane nations, and who reflect at the same time that neither can the measure of military justice be brought to the standard of that of ordinary offences, nor can the elements of the former bear any assignable relation to those of the latter.

In this order of ideas, which military criminal science is not yet able to change for others, it appears to the minority of the Committee of War that Capital Punishment being exceptionally maintained, in military justice ought likewise to be employed in time of peace, whenever this punishment is deemed the one only efficacious means of preventing the extreme cases of

rebellion, military sedition, and insubordination. This is not only requisite for the preservation of order and of the public safety, but the very existence of the army itself is interested in the energetic repression of such crimes.

If Capital Punishment possesses all the defects which the minority of the Committee itself confesses, it ought either to be condemned in every possible case whatever, or, if it be maintained in any one, there is no ground for its suppression in the above-mentioned cases, since they may in the very midst of peace be highly perilous to public safety, and may destroy the army itself by want of discipline and by most serious results.

The minority of the Committee does not pretend, nor is it able, to trace here the outline of military criminality, or to discuss in this place a scale of punishments; its object is merely to bring before you the propriety of extending the application of Capital Punishment to a few very rare cases, and of not rendering it impossible, by the law which we are at present passing, to introduce the said punishment into some future code, which, after having been examined and discussed by the chambers, may define in the clearest manner what are the few cases in which the punishment of death ought to be applicable besides the time of war and its cases.

Perhaps the hypothetical cases which have been omitted do not exceed at the most two or three, and on this account the minority of the Committee does not shrink from calling them to mind, feeling certain of always finding in our tribunals the greatest prudence in their sentences, and in a higher region the intervention of the royal prerogative in such cases as call for the exercise of its august prerogative; but in its conscience, and for reasons which will find an echo in the minds of many deputies, it considers that it would be imprudent to expunge from our law a great means of repression, which, in respect to military crimes committed in time of peace, we again saw adopted last year in the very country of Beccaria, which is maintained in that of Rossi, and which was preserved in the French Military Code of 1857, in accordance with the opinions of erudite writers on crime, and of generals who to this same quality of erudition added their experience of discipline.

The minority of the Committee has, therefore, the honour to bring forward the subjoined amendment to Article II. of the law proposed by the Government.

Article Two.

The punishment of death is hereby suppressed likewise in cases of military crimes, committed by individuals belonging to the army or the fleet, excepting for those which may be committed during or in act of war between Portugal and any foreign nation, or even in time of peace, when they may either be perpetrated against the safety of the State, or incompatible with the discipline of the army, provided always that they cannot be classified under the head of political crimes.

Committee Room, 7th April 1864.

Here follow the signatures, viz.:—

Augusto Xavier Palmeirim.
Antonio de Mello Breyner.
Baraõ do Rio Zezere.

PROJECT OF LAW No. 6 K.

Gentlemen,

A few days before the close of the last Legislative Session, and at the commencement of the discussion on the Seventh Chapter of the estimates for my Ministerial Department, an illustrious deputy, in delivering an eloquent speech against the maintenance of the punishment of death in our penal code, incidentally brought forward a project of law for the complete suppression of that punishment.

In replying at the time respecting this subject, I stated that I agreed with the fundamental principle of the project, but that I had doubts as to the opportuneness of its being then brought forward. In fact, it appeared to me that the occasion and the mode of its being laid before you had not, perhaps,

been the most opportune for its being prepared with all the care and the reflection which it required, and for its being discussed with the calmness which a question of this class demands, and which cannot easily be attained in the few last days of a legislative session.

The project, thus brought forward, obtained the opinion of the Committee of Legislation, to which it was referred; but, in spite of the goodwill and of the well-known enlightenment of that Committee, the hurry in which it had to proceed to the examination of the measure was so precipitated, that in approving the proposed principle of the suppression of the punishment of death, it had not time to draw up any one single rule of any kind as to the sentences which should be pronounced in its stead in those cases in which the legislation at present in force still admits capital punishment.

The session was closed before the above-mentioned project could be brought forward for discussion; and the Government, finding that the chamber clearly manifested a desire so completely in harmony with its own feelings, did not hesitate an instant to adopt so generous a sentiment. I set myself immediately to the task of studying this question, which belongs more especially to my department, with all the care which it deserves by reason of those most elevated interests which are found to be concerned in its solution. If there is on the one hand a question of man's existence, the first and one the most sacred of his absolute rights, there is on the other hand a question of the safety and of the existence of that civil society, which is the guarantee of all rights, and is a condition as necessary for the existence and the development of man, when considered in his relations to other men, as his own absolute rights are necessary for his own development, when considered in his one individual and personal being.

In the interval between our parliamentary labours, I therefore gave to this subject all due attention, and a very brief summary of the results of my studies will now serve as a recital (or preamble) to the proposed law which I have the honour to bring before you.

The year which has lately begun is the last year of one century since the publication by Beccaria of his *Treatise on Crimes and Punishments*, the work in which the lawfulness of the punishment of death was for the first time contested. Beccaria was the first who protested against this violation of social duty, and in half a century afterwards this protest of a grand intelligence was repeated in the tribunes of legislative assemblies, and at the bars of tribunals, wherein the law, of which the predominant ideas were to strike terror and to take vengeance, was replaced by another law, of which the enactments are guided by the desire to effect the moral regeneration of culprits, by inflicting punishments which do not render infamous, and by bestowing that education of which the absence is so frequent a source of crime.

Another half century has passed away, and already the execution of a sentence of death not only excites the indignation of high-minded men but horrifies even the populace in all countries where the natural instincts of man have not been counteracted by education. The scaffold has fled from the midst of the population or hides itself within the enclosure of the walls of a prison; and that which in past ages was almost a festival and a public solemnity, is now like a cowardly and mean action, which society seems to blush to commit in public and before the light of day. It is the instinct of humanity which condemns that which the law itself will not long tarry to condemn, for I hope that another half century will not have to pass away for it to be necessary for a man to travel beyond the confines of Europe if he still wishes to find the punishment of death inscribed upon the pages of the penal code of any civilized nation.

I will not in this place resuscitate a question which has already on all sides been set at rest, I mean the question of the lawfulness of the punishment of death. In this regard it will be sufficient to say that this punishment infringes an absolute and as such an inviolable right. Even if, however, such a punishment were not intrinsically unlawful, a single consideration would suffice for its condemnation; it is absolutely irreparable. Irreparable punishments are morally inadmissible, so long as infallibility shall not be one of the most commonplace qualities of the human mind, and absolutely invariable rectitude one of its most characteristic features.

One of the most remarkable writers on crime who in modern times still defend the lawfulness of the punishment of death concludes with the following remarkable words:—

"Let us recapitulate these various reflections. The punishment of death "does not bear upon itself the brand of unlawfulness; it is included in the "rights of society. But the exercise of this right is dependent upon two con- "ditions, its efficacy and its present necessity. The efficacy of the punishment "of death in respect of a certain class of crimes, of which the determining "motive arises from interest, or, again, even from passion, is quite incon- "testable; but in these very cases its application may give room sometimes "for terrible remorse. Finally, its present necessity is strongly denied; and "it cannot but be confessed that the grave facts and new circumstances give "to their denials a value which goes on increasing from day to day. Doubt "has taken possession of many minds; nevertheless, before a legislator "accords the definitive suppression of this punishment, he ought to pause to "see that its suppression does not tend to destroy the repose of the public, "and that the measure is adopted by general opinion. Legislation ought not "to go before society; it ought to confine itself to follow it."

In the sentences which we have here transcribed, we find the most formal condemnation of the punishment of death pronounced not many years ago by one of those few writers upon crime in whose minds the inherent unlawfulness of such a punishment is still able to admit of any doubt. We may, then, without any hesitation, take for our starting point the conclusions of this illustrious author, and investigate the questions whether the suppression of the punishment of death in Portugal—

1. Will be adopted by public opinion;
2. Will be dangerous to the public safety.

Let us examine each of these points.

In Portugal, for the last 18 years, no sentence of death which has been pronounced by the civil tribunals has been carried into effect. The last execution which took place was at Lagos, on the 22nd of April 1846. And it is right to state also, that ever since the definitive re-establishment of a liberal government in this country, capital punishments have never been very numerous. Thus during the 13 years which elapsed between 1833 and 1846, inclusive, out of 99 culprits condemned to death there were only 32 executed, and the sentences of the remaining 67 were commuted.

And with all this, it is incumbent upon us to confess that a re-perusal of the trials of those few culprits who were executed does not leave the mind free from doubts whether there may not have been some of them in whose cases the application of so severe a punishment ought not to have been commuted into some other sentence, which would have been susceptible of reparation, lest perchance it should eventually have been proved, as perhaps it might in some of these cases have been not impossible to prove, either that the criminality of the culprit was really less than had been supposed, or that, on account of the disordered state of his mental faculties, he was not responsible for the deed he had committed. I do not intend by these reflections to throw blame on any one. I only mean to demonstrate, by means of what took place in the course of so small a number of executions, how great is the peril of irretrievable punishments, and how slight is the distinction which, in their execution, exists between the act of society and that of the criminals. It may happen, and in every country it has more than once happened, that upon the steps of the scaffold the culprit who is executed is not so great a criminal as that society which is murdering him by the hand of the executioner.

Let us make a further remark. At one of the above-mentioned executions, which took place at Oporto on the 23rd July 1838, the impression which the arrangements for the execution made upon the people, who had come in crowds to the spot, was so great that the multitude twice fled away in dismay! At the execution which took place at Lisbon on the 28th of April 1842, the priest who accompanied the condemned criminal fell down, suddenly struck with apoplexy, at the moment when they arrived together at the foot of the scaffold. These and other facts, which have taken place since that time at other executions, must by degrees have gone on producing a great impression on public opinion, for the different ministers who since 1846 have been at the head of the affairs of the country have preferred tendering to our Portuguese monarchs, always of their own accord inclined towards clemency, advice in harmony with the

natural disposition of the Royal mind, rather than allow the renewal of exhibitions which are no less repulsive to the Government which ordains them than they are to the people who are present at them.

Our country is, then, the only one in Europe in which the punishment of death has been for the last 18 years *de facto* suppressed. Public opinion has gone before the law; and the law, in effacing this punishment from its provisions, far from being in anticipation of society, will not do more than give its sanction to a fact which has long been accepted by general feeling, and which at the present day it would be difficult to contravene. Even if the punishment of death were to remain inserted in the text of our penal legislation, I think I may with safety affirm it would be impossible to meet with a Minister of Justice who would venture to recommend the King to withhold the exercise of the Royal prerogative of pardon, and who would have the heart to order the timbers of a new scaffold to be again erected on the soil of Portugal.

Let us now inquire whether the second condition, laid down by the partisans of Capital Punishment as indispensably necessary for its suppression, has in like manner been fulfilled in our country.

Will the suppression of the punishment of death be dangerous to the public safety? In other words: can there be any grounds for apprehending that the suppression of the punishment of death will increase the number of crimes?

Unfortunately we are not in possession of statistical elements, worthy of being received with entire confidence, down to the year 1850. Not only was this division of official work left up to that time, and even for a little afterwards, in a sad state of disorganization, but it is also impossible to ignore the fact that, even after the organization of the statistical departments, its results could not at that time afford to us reliable data concerning the normal state of the country in relation to the question of criminality.

It is universally admitted that the criminality existing in any nation may be greatly influenced in its amount, on the one hand by the want of repressive powers on the part of the public authorities, and on the other hand by that excitement of political passions which is almost always engaged in secret struggles, and full of rancour and hatred, sometimes displayed in acts of isolated vengeance, and at other times finding a vent through the broader opening afforded by civil strife and public intestine discord. And at such times as those it is impossible to distinguish between two classes of crimes (whether crimes against person or against property), viz., those which are the offspring of political passions in the temporary outburst, which in a few months or years will have calmed down; and secondly, those which derive their origin from the moral perversity of individuals, that social cancer to which penal laws, aided by public education, are called upon to apply a remedy.

This is what happened amongst us. Long years were spent in establishing the administrative organization upon the ruins of the old *régime*, which had been overthrown and proscribed. The excitement produced by the long civil struggle which the establishment of constitutional government had cost us; the want of vigour in the public administration as long as it had not been definitively organized; and, finally, the state of almost permanent revolution in which the country subsisted up to 1851, did not allow us to find, in the first statistical labours which were regularly instituted, the means of separating that portion of their results which belonged to ordinary causes from that which could only be held to appertain to causes of an exceptional character.

In 1852 the labours of criminal statistics were brought to a certain degree of organization in my ministerial department, and a beginning was then made by collecting the facts relative to the year which had previously expired. And I hope I may be allowed to take this opportunity of stating that, as a result of the elements prepared by the degree of the 19th of August 1859, (which has full force of law,) I expect that in a very short space of time the work of criminal statistics will be brought amongst us to the same perfection with which it is already carried out in Austria, in England, in France, and in Spain. The reports upon the year 1860 are almost concluded, and those of the year 1862 are in a state of great advancement.

At present, however, for the reasons above set forth, I shall confine myself to making use of the data supplied to me by the 10 years which elapsed between 1850 and 1860.

They are summed up in the subjoined table. (*See* Appendix.)

If we extract from the table the portion especially relating to crimes of homicide (the most common of those few crimes on which our penal code inflicts the punishment of death), we shall see that the number of these crimes has diminished since 1850, from year to year. The number of the crimes of homicide committed in the above-mentioned years is as follows:—

Years.	Crimes.	Years.	Crimes.
1851	278	1856	162
1852	288	1857	152
1853	255	1858	139
1854	224	1859	146
1855	173	1860	142

By a comparison of the data represented in this little table it is easy to ascertain that the number of crimes under the head of "homicide" has, during the period between 1850 and 1860, decreased from the proportion of 12 per cent. to that of 5 per cent., as compared with the total number of crimes committed against persons, and that for the same period its average number, as compared with the same class of crimes, has been 8½ per cent.

It is, therefore, incontestable that during the 10 years which are comprised in the two tabular statements the number of crimes has not been augmented, and even that in those crimes to which our present legislation applies the punishment of death almost exclusively the number has diminished. And together with all this, as I have already had occasion to urge upon your notice, the suppression of the punishment of death is a fact which for 18 years has been accomplished by public opinion and usage, and the nation has a moral certainty that the three beams of the gibbet will never again return to cast their sinister shadow upon the soil of this country. The fear of the punishment of death no longer serves at the present day to restrain those whom the other passions impel to criminal actions. Therefore our legislation, in suppressing this punishment, will not suppress any element of repression which has a *de facto* existence; it will merely bring our laws into accordance with our customs, and nothing more.

If, then, the present state of the amount of crime is produced by the ordinary elements, and is completely foreign to the existence or non-existence of the punishment of death, it is to be hoped on the other hand that the causes which generally exert their influence in favour of the diminution of crime will produce their ordinary effects amongst ourselves independently of the action of that punishment. The development of the relations of social life produced by the facilitation of means of communication, and by the increased mutual familiarity thereby introduced amongst our people; the diffusion of learning and of improved moral arrangements in schools and in the associations of operatives; the increase in the wages of labour; and on the other hand the greater facility and the greater resources and means of action of our police, and the creation of penitentiary establishments, for which more than one proposal is now before the chamber, and to which you will beyond doubt accord your enlightened attention; such are the principal causes of a diminution of crime which ought, independently of the suppression of the punishment of death, to exert their action upon our civil society.

I believe that in another point of view there are advantages in the suppression of this punishment. The hatred of the punishment of death, by the action which it exerts upon public opinion, has even made its way into our tribunals; and it would not be difficult to prove that, on the one hand, the just feeling of repugnance to this punishment, and on the other hand the fulfilment of their duty when there is a question of so grave a punishment, have incited our superior tribunals to the exercise of a minute scrupulousness as to details whenever the trials before them involve the application of such a sentence. Hence there has arisen the annullation of a certain number of these trials, and their being submitted after a considerable lapse of time to fresh judgments, when in some cases certain elements of proof had already vanished, and when in almost every case the first impression of horror, which had been produced by the crime itself has had time already to give place to feelings of pity for the criminal as a necessary effect of that reaction of the sentiments which is so

common amongst the people of southern climes. Hence it comes to pass that the result of the new trial before a fresh jury is sometimes a radical diminution of the offence of which the culprit is found guilty, and at other times it is a verdict of complete acquittal.

In another respect, we find that the royal prerogative, in exerting its right of pardoning criminals condemned to death and in commuting their punishment into the next one which is fixed by the penal scale, is compelled to place them in a much more favourable position than that which is appointed for other culprits, whose crimes have been acknowledged by the tribunals to be less heinous than those of the persons under sentence of death. Thus in the case of two culprits, of whom the one has merited a condemnation to death by virtue of the 351st Article of the penal code, and the other who by reason of his less heinous offence has only merited the punishment of public labour for life in Eastern Africa, the commutation of the punishment of death into the next one in the scale has the effect of completely inverting the relative position of the two persons, since it reduces the punishment of the greater criminal to that of simple banishment for life in Eastern Africa. And in this state of things the royal prerogative has to choose between an absolute abstension from its right of pardon, or an application thereof to criminals whom in many cases it would certainly have never regarded under any other circumstances but those exceptional conditions. This is, in great measure, the explanation of the use made, for a certain number of years, of the royal prerogative to an extent which under normal conditions would perhaps have been excessive.

Such are, in a summary form, the motives which have determined me to bring before you the proposed law which I now have the honour to submit to your consideration.

You are aware that the punishment of death was abolished in all cases of political crimes by the 16th article of the additional Act of the 5th of July 1852. It has been preserved in our legislation in certain civil and military crimes only. In the last-mentioned cases it has not been put in execution for more than 15 years. My colleagues, the Minister and Secretaries of State for the Affairs of War and of the Navy and Colonies, with whose signatures also the present proposed law comes before you, concur in the suppression of the said punishment in military crimes, with one slight modification; viz., that of the crimes now liable to capital punishment which may be committed during or in act of war with a foreign power. As to all civil crimes, I propose the abolition of the punishment of death without any restriction whatever.

Nevertheless, in rejecting this punishment I cannot but recognize the different degree of gravity which separates the crimes which by our penal legislation were made capital offences from those to which a secondary punishment was assigned by it. It was, in the next place, impossible not to recognize the necessity of preserving, in the list of punishments which are to be in force, a graduated scale arranged in proportion to the relative degrees of criminality involved in the deeds to be punished. This is the reason which has determined me to replace most of the punishments which are now inflicted for life by temporary punishments of the same class within the limit of 20 years. I do not consider that repression will lose any of its strength by this measure. On the one hand, the maximum of this punishment (viz., 20 years) still carries the criminal as far as the ordinary term of human life, or at all events as far as an age at which, if he has failed to amend, his strength for ill-doing is already broken down. On the other hand, it has been constantly remarked that nothing is so favourable to impunity as the excessive rigour of punishments.

From this modification of the punishments for life there unavoidably resulted a reduction in the maximum of the punishments at present inflicted for a term of years. And the result of all this has been to facilitate in a reasonable degree the system of the aggravation and extenuation of punishments in cases in which there are found to be aggravating or extenuating circumstances, since the graduated scale can always be carried into effect within the same class of punishment, a system which I deem to be very preferable to the one which our penal code was found to be compelled to adopt, and which allowed certain punishments to be commuted into others of a different kind, and placed in the hands of the tribunals an arbitrary power, necessary, indeed, up to a certain

point, but which, when conferred upon them with so great a latitude, has been, and cannot fail to be, a source of the greatest irregularities.

Finally, the authorization which I request in the conclusion of the proposed law is intended to perform, once for all, an operation upon the penal code which otherwise the judges would have had to undertake in each of their sentences, by replacing the provisions which will now be revoked in the text of the penal code by those which the new law establishes in their stead, without however allowing the operation of this same law to be delayed beyond the day of its promulgation. The task of the criminal tribunals will thus be rendered more easy; and many doubts and errors, which might otherwise have been of frequent occurrence, will be prevented.

Office of the Secretary of State for Affairs
Ecclesiastical and of Justice, 7th January 1864.

(Signed) Gaspar Pereira da Silva.

PROJECT OF LAW.

Article One.

The punishment of death is hereby suppressed in all cases of civil crimes.

Article Two.

The punishment of death is in like manner suppressed in military crimes, excepting in the case of those which may be committed during or in act of war between Portugal and any foreign nation, by individuals belonging to the army or to the fleet.

Article Three.

To the crimes to which the punishment of death was applied by the legislation at present in force, there shall be applied that of public labour for life in Eastern Africa.

First Paragraph.—This punishment is not susceptible of aggravation or reduction.

Second Paragraph.—This punishment shall in no case be applied either to females or to sexagenarians, or to those who shall prove in a fitting manner that they are in such a state of ill health as to be unable to be employed on public labour. In these cases the punishment established in this article shall be changed into that of banishment for life in Eastern Africa, accompanied by imprisonment, with or without labour, for life in the place of banishment.

Third Paragraph.—This change in the punishment shall take place in the sentence, if the facts on which it is based already exist at the time; or it shall be effected afterwards, without depending on any new sentence, if the 60 years of age are completed, or if the state of ill health shall supervene during the undergoing of the punishment inflicted.

Fourth Paragraph.—To individuals under 17 years of age to whom, according to the terms of the penal code, the punishment of imprisonment with labour for life would have had to be applied in lieu of that of death, the punishment established in the present article may be applied. Nevertheless, this punishment shall only be applied to them after they have completed the age of 17 years; up to that time they shall be subjected to imprisonment with labour in proportion to their strength.

Article Four.

To the crimes to which by the same code there were applicable for life any of the punishments of public labour, banishment, or imprisonment, the same punishment shall be applied, but only for a term of years which shall not exceed 20.

First Paragraph.—The punishment of expulsion from the kingdom for life shall continue to be applied according to the mode and in the cases established in the penal code.

Second Paragraph.—The loss of political rights shall continue to be applied in the same manner, whether it be as a punishment or as a consequence of punishments for terms of years or for life, in the cases in which those punishments are in force.

Article Five.

The maximum of the duration of punishments is hereby in the same manner reduced to 10 years in those cases in which the penal code ordained that they should be applied for a term of years, of which the maximum was fixed at 15 years.

Article Six.

The punishment for a term, whether of 10 or 20 years, shall not be able to be aggravated in so far as touches their duration. When, however, there is ground for the infliction of an aggravation of the said punishments, the following rules shall be observed:—

First Paragraph.—The punishment of public labour and of imprisonment may be aggravated by being applied beyond the seas.

Second Paragraph.—The punishment of banishment may be aggravated in the following ways:—

1st. When it is for Eastern Africa, it may be aggravated by imprisonment at the place of banishment, but without exceeding the term of years fixed by the sentence.

2nd. When it is for Western Africa, it may be aggravated by being changed to Eastern.

3rd. When it is for India, it may be aggravated by being changed for Western Africa.

Article Seven.

The diminution of punishments shall take place upon the following terms:—

First Paragraph.—The punishment of the loss of political rights for life shall be able to be changed into that of the suspension of their exercise for a term of from 10 to 20 years.

Second Paragraph.—The punishment of expulsion from the kingdom for life shall be able to be changed into a temporary expulsion of from 10 to 20 years.

Third Paragraph.—The punishment of terms of 20 years may be reduced in their duration down to 10 years.

Fourth Paragraph.—The duration of the punishment for terms of 10 years shall be able to be reduced to the minimum of three years.

Article Eight.

All other punishments shall continue to be applicable in accordance with the mode established in the present legislation.

Article Nine.

The Government is authorized to alter, so as to bring into harmony with the present laws, those articles of the penal code whereof the provisions shall be found to be modified hereby.

Article Ten.

All legislation to the contrary is hereby repealed.

Office of the Secretary of State for Affairs
Ecclesiastical and of Justice, 7th January 1864.

(Signed) Gaspar Pereira da Silva.
Sá da Bandeira.
José da Silva Mendes Leal.

Appendix.

(See p. 10 of the original Portuguese, and folio 519 of this translation.)

In the Year	Number of crimes committed against,—							
	Religion.	The Security of the State.	Order and Public Tranquillity.	The Person.	Property.	Police Regulations.	Sundries not included in the preceding.	Total.
1851	6	6	325	2,252	754	174	105	3,622
1852	13	4	414	2,722	806	198	231	4,438
1853	4	1	413	2,583	1,043	121	243	4,408
1854	4	1	447	2,198	1,058	216	216	4,140
1855	6	—	358	1,818	1,046	102	172	3,502
1856	3	—	333	1,934	1,219	128	163	3,780
1857	—	—	332	2,124	1,248	306	155	4,165
1858	5	—	331	2,325	1,016	166	186	4,027
1859	5	2	445	2,740	959	269	179	4,599
1860	6	—	429	7,467	967	245	303	4,417
Total of Classes	52	14	3,827	23,211	10,116	1,925	1,953	41,098

RUSSIA.

En Russie la peine capitale ou peine de mort, sous le rapport du mode et des causes qui en déterminent l'application, diffère essentiellement des législations établies sur cette matière a l'étranger.

Ainsi, certains crimes, comme l'homicide, l'empoisonnement, le vol, sont punis ailleurs de la peine capitale, tandis que d'après le Code Pénal Russe ces mêmes crimes importent avec différentes modifications la privation des droits de citoyen, la déportation, et les travaux forcés aux mines.

Dans notre législation les crimes en général, par leur nature, se divisent par catégories, en crimes attaquant la religion, crimes d'Etat ou politiques, crimes et délits attentatoires à la vie, à la santé, à la liberté et à l'honneur des individus, et en délits de toute nature dirigés contre l'ordre, la sécurité, et l'intérêt tant du Gouvernement que de la société.

De tous ces crimes, il n'y a qu'une seule des catégories sus-mentionées dont les crimes dans certains cas prévus par la loi sont passibles de la peine capitale; ce sont les crimes politiques.

Comme tels sont reputés :—

1. Les crimes dirigés contre la personne de l'Empereur et celles de la Famille Impériale.

1. The Punishment of Death in Russia with respect to the causes which determine its application differs essentially from the laws in force on this subject in foreign countries.

For instance, certain crimes, such as homicide, poisoning, robbery, are punished elsewhere by death, whilst according to the Russian penal code these crimes involve, under different modifications, the loss of civil rights, transportation, and hard labour in the mines.

By Russian Law crimes in general by their nature divide themselves into categories, i.e. crimes attacking religion, state or political crimes, crimes or misdemeanors in contempt of the life, health, liberty, or credit of an individual, and into misdemeanors of every kind affecting the order, security, and welfare of the Government and of society.

Of all these crimes there is only one class under which the commission of offences in certain cases provided by law is punishable with death. That class consists of crimes against the State, or Political crimes.

Such are held to be:—

1. Offences against the person of the Emperor or Royal Family.

2. La révolte contre le Pouvoir Suprême.

3. Les crimes de haute-trahison et attentatoires au droit public.

Avant d'énumérer les cas où la loi inflige la peine de mort, il est important de consigner ici que les crimes d'état punissables de mort, comme très-exceptionels, sont, depuis une époque assez réculée, et notamment depuis le règne de l'Impératrice Catherine II., subordonnées non à l'examen et à la procédure des tribunaux criminels ordinaires, mais jugés par une Haute Cour de Justice extraordinaire, érigée chaque fois ad hoc par un oukase émanant du Pouvoir Suprême, et composée de membres du conseil de l'Empire, du Sénat dirigeant, et du Saint Synode et de quelques autres dignitaires tant civils que militaires.

La formation et les règlemens de procédure de cette Cour, désignée sous le nom de Tribunal Criminel Suprême, sont basés sur la tradition et les précédents, ainsi qu'il est consigné dans le Manifeste Impérial du 1r Juin 1826.

" Nous avons voulu conserver force
" de loi aux exemples anciens."

Il appert donc de ce qui précède, que dans le cours ordinaire de la justice, la peine de mort, quoiqu'existant de jure dans notre législation, de facto n'est jámais appliquée par la voie des tribunaux criminels ordinaires, à moins qu'un oukase Impérial n'en confère l'obligation exceptionnelle, soit à une cour Suprême, comme il est dit plus haut, soit au Sénat, ou à des Tribunaux de première et de seconde instance, en égard au plus ou moins de gravité des crimes à juger.

En remontant jusqu'au règne de l'Impératrice Catherine II., nous voyons qu'à partir de la révolte du cosaque Pougatcheff la peine capitale n'a été mise à exécution que fort rarement.

Ainsi, sous l'Empereur Nicholas I., l'insurrection qui a accompagné son avénement au trône ayant été comprimée, cinq des principaux conjurés out été condamnés à la peine de mort. Plus tard, lors des soulèvements de la Pologne plusieurs meneurs et insurgés out subi également et à différentes reprises la peine capitale; mais il faut ajouter que les crimes sus-mentionnés étant d'une nature particulière, et ayant été commis dans des circonstances extraordinaires, les premiers furent jugés par une Cour Suprême érigée ad hoc, et la sentence soumise à

2. Rebellion against the Supreme Power.

3. High Treason, and defiance of Public Law.

Before enumerating the cases where the Law inflicts the Punishment of Death, it is important here to remark that State crimes punishable with death, though very exceptional, from a remote period, and particularly since the reign of the Empress Catherine II., are not subjected to the inquiry and procedure of the ordinary criminal tribunals, but decided by a special High Court of Justice created for each occasion by a decree emanating from the Supreme Power; this court is composed of members of the Imperial Council, of the Ruling Senate, of the Holy Synod, and of other dignitaries both civil and military.

The formation and procedure of this Court, designated by the name of the Supreme Criminal Tribunal, is based upon tradition and precedent as it is stated in the Imperial Manifesto of June 1st, 1826.

" It is our Will to preserve the
" strength of the Law by ancient
" examples."

It appears then from the foregoing, that in the ordinary course of justice the Punishment of Death, although existing by Law under the Russian Code, is in fact never applied by means of the ordinary criminal tribunals unless an Imperial ukase has conferred the exceptional obligation either upon the Supreme Court as above mentioned, or upon the Senate, or upon the Courts of First or Second Instance, regard being had, more or less, to the gravity of the crime to be adjudicated.

In going back to the reign of the Empress Catherine II. we find that from the rebellion of the cossack Pougatcheff capital punishment has very rarely been inflicted.

So, under the Emperor Nicholas I., the insurrection which accompanied his accession to the throne having been checked, five of the principal conspirators were condemned to death. Later, at the time of the rising in Poland, many ringleaders and insurgents suffered death alike in many instances; but it must be added that the above-mentioned crimes being of a peculiar character, and having been committed under extraordinary circumstances, the former were tried before a Supreme Court created for that occasion, and the sentence submitted

la confirmation suprême; et les derniers d'après des statuts du code des lois militaires de campagne, qui n'est mis en vigueur habituellement, que lorsque telle ou autre localité, ou même tout un pays, est déclaré en état de siége, à l'effet de prévenir ou d'arrêter l'extension de calamités publiques, telle qu'une révolution générale ou partielle, des incendies, des maladies épidémiques, &c.

Les crimes d'état ou politiques qui d'après le Code Pénal Russe déterminent l'application de la peine de mort sont :—

1. Tout attentat prémédité contre la vie, la santé, et l'honneur de l'Empereur, ainsi que toute intention de le détrôner, de le priver de sa liberté et de son pouvoir, de limiter ses droits ou d'exercer quelque violence sur sa personne.

2. Non seulement les actes précités, mais encore toute mesure prise à l'effect de consommer les crimes mentionnés dans l'article précédent, sont réportés crimes de même nature.

3. Toute participation, directe ou indirecte, tendant à commettre les attentats indiquées au Sec. I. contre la personne de Souverain constitue un crime de la même nature.

4. Au même degré de culpabilité sont assimilés les crimes énumérés dans les articles précédens lorsqu'il y a attentat contre l'héritier du trône, l'Impératrice, et les membres de la Famille Impériale.

5. La révolte contre le Pouvoir Suprême, c'est-à-dire, soit un soulèvement en masse contre le Souverain et le pays, soit l'intention de renverser le Gouvernement sur toute l'étendue de l'Empire, ou une partie de son territoire, d'en changer la forme ou la loi sur l'ordre de succession au trône; enfin, toute conjuration tendant à ces résultats, ainsi que toute coopération ou participation active, directe ou indirecte, dans la poursuite d'un but de cette nature, même d'une manière inactive, mais avec connaissance de cause.

6. La haute-trahison, ainsi que tout acte portant le caractère d'un attentat contre l'intégrité et la sécurité du pays, soit en livrant des armes, soit en dévoilant des sécrets d'État à un pays étranger, soit en compromettant sciemment les intérêts directs du Gouvernement et du pays en faveur de l'ennemi.

7. Les fondateurs, les chefs, et les membres de toute société secrète ou

for the Supreme confirmation; the latter under a provision of a code of military campaign laws, which is not always put in force, but only when such or any other locality or even the whole country is declared in a state of siege, with the view to prevent or arrest the progress of public calamity, such as a general or partial revolution, incendiary fires, epidemics, &c.

State or political crimes which under the Russian Penal Code involve the Punishment of Death are :—

1. Every premeditated attempt against the life, health, or honour of the Emperor, as well as every design to dethrone him, or to deprive him of his liberty or his power, to curtail his rights, or to use any violence against his person.

2. Not only the above-mentioned acts, but every measure taken with the view to consummate the crimes mentioned in the preceding articles are held to be of the same character.

3. All direct or indirect participation tending to commit the attempts mentioned in Sec. 1. against the person of the Emperor constitutes a crime of the like character.

4. In the same degree of criminality are classed the crimes mentioned in the preceding articles when there has been an attempt against the life of the heir to the throne, the Empress, or Members of the Imperial Family.

5. Rebellion against the Supreme Power, that is to say, whether it be a general rising against the Sovereign and the country, or the intention to overthrow the Government throughout the whole extent of the Empire, or a part of its territory—to change the form or law of the order of succession to the throne—in a word, every conspiracy tending to produce these results, as well as every assistance or active participation, direct or indirect, in prosecuting a design of this nature, although not overtly but with a knowledge of the design.

6. High treason, as well as every act having the character of an attempt against the integrity and security of the country, either by supplying arms, or in divulging State secrets to a foreign country, or in knowingly compromising the direct interests of the Government and the country in favour of the enemy.

7. The originators, leaders, and members of every secret and anony-

anonyme ayant un caractère et un but hostile à l'intégrité et à la sécurité du Gouvernement et de la société, ou attentatoire à la forme et à l'ordre du Gouvernement, sont réputés criminels au premier chef et passibles de la peine capitale.

8. Toute infraction aux lois établies pour les quarantaines ou cordons sanitaires à la fin de préserver le pays de la peste, lorsque cette infraction a un caractère de violence et de préméditation, que ce soit par la force armée, par l'incendie des établissements de quarantaine, par la falsification de documens quarantaines, ou par tout autre moyen tendant à paralyser les efforts du Gouvernement pour sauve-garder le pays.

9. Tout endommagement causé sur les lignes télégraphiques devant coopérer ou faciliter la perpétration des crimes d'État consignés dans les ss. 1, 4, 5, et 6.

II. Tout accusé convaincu d'avoir commis un crime entraînant la peine de mort doit nécessairement y être condamné par le tribunal, qui dans aucun cas et de son pouvoir privé ne peut ni l'absoudre ni commuer sa peine. Toutes les fois néanmoins que le tribunal trouve des circonstances atténuantes, prévues et statuées par la loi, il peut, par l'entremise du Sénat, les soumettre à l'examen et à la clémence de l'Empereur, qui seul a le droit de commuer la peine ou d'accorder une grâce plénière.

III. Le degré premier des peines infligées pour crimes d'État étant la mort du condamné—la peine la plus sévère constituant dans le Code Pénal Russe; le second degré des peines est la privation de tous les droits de condition, avec déportation aux travaux forcés des mines pour un tems illimité. De la clémence du Chef de l'État, comme il a été dit plus haut, et uniquement de son pouvoir suprême, dépend toute commutation de la peine, ainsi que la mesure de la nouvelle punition, la loi étant muette sur le degré inférieur de la peine à infliger lorsque la condamnation légale du tribunal porte la peine capitale. Dans certaines circonstances, mais toujours émanant de la volonté suprême, cette dernière peine est remplacée par un genre de dégradation que la loi désigne sous le nom de mort politique. Le condamné alors est publiquement conduit sur un échafaud, où il reste exposé un certain

mous society having the character and bearing a hostile design against the integrity and security of the Government and of society, or attempts against the form and order of the Government, are held to be criminals of the highest degree, and punishable with death.

8. Every breach of the laws passed for quarantine or sanitary regulations to preserve the country from the plague, when this breach bears the character of violence and premeditation, either by an armed force or by incendiarism of quarantine establishments, by falsification of quarantine documents, or by any other means tending to paralyse the efforts of the Government to preserve the country.

9. Every damage caused to the telegraph with intent to assist in or facilitate the perpetration of the State crimes mentioned in the Sections 1, 4, 5, & 6.

II. Every prisoner convicted of having committed a crime involving the Punishment of Death must of necessity be sentenced for it by the tribunal, which in any case of its own private power cannot either remit or commute the punishment; nevertheless as often as the tribunal find extenuating circumstances, provided and determined by the law, it may through the medium of the Senate submit them for the examination and clemency of the Emperor, who alone has the power to commute the punishment or to grant a full pardon.

III. The highest degree of punishment inflicted for State crimes being the death of the condemned—the most severe punishment in the Russian penal code,—the second degree of punishment is the loss of all civil rights, with transportation and hard labour in the mines for an unlimited time; any commutation of the punishment, as well as the amount of the new punishment, depends upon the clemency of the Head of the State, and, as before mentioned, solely on his Supreme Power, the law being silent as to what inferior punishment is to be inflicted when the legal sentence of the tribunal is capital punishment. Under certain circumstances, but always from the will of the Supreme Power, this latter punishment is replaced by a kind of degradation which the law defines by the name of "political death." The condemned is then publicly conducted to a scaffold, where he remains exposed for a certain

tems aux yeux du peuple, placé sous une potence, ou la tête posée sur le billot; si le criminel est du condition noble, une épée est en outre brisé au-dessus de sa tête par le bourreau. Cette peine est toujours accompagnée de la perte de tous les droits de condition, avec déportation aux travaux forcés des mines pour un tems fixe ou illimité. En général toute peine criminelle ou correctionnelle sanctionnée par l'autorité suprême, qu'elle soit commuée ou non, est infligée en entier, et ne peut être commuée plus tard que par un Manifeste Impérial, ce qui a lieu plusieurs fois durant le règne d'un souverain.

IV. Dans ces derniers tems la loi n'a subi aucune modification dans l'application de la peine de mort, ni en plus, ni en moins, c'est-à-dire, que les crimes autrefois punis de mort le sont également aujourd'hui. Aussi, comme hormis les crimes mentionnés plus haut et qualifiés de crimes d'État ou politiques—crimes qui par leur nature sont plus exceptionnels, et par conséquent fort rares,—et les autres genres de crimes n'entraînant point la peine capitale, il n'y a pas de chiffre à établir quant à la diminution ou à l'augmentation des crimes passibles de la peine de mort; de même il ne peut y avoir de proportion à observer entre les arrêts de mort et les commutations de cette peine en d'autres peines moins sévères.

V. La sentence de mort peut être effectuée de trois manières. Le condamné est fusillé, ou pendu, ou il a la tête tranchée. Mais ces différens modes d'application de la peine capitale, n'étant point spécifiés dans la loi pour tel ou autre cas, le mode doit en être fixé dans l'arrêt du tribunal qui porte la sentence de mort. Quant à l'exécution même, il y est procédé de la manière suivante:—

Lorsque la sentence de mort a été lue au condamné, il lui est accordé une semaine pour se confesser et se préparer à recevoir la Sainte Communion. Si le coupable témoigne un repentir sincère, le prêtre, après la lui avoir administrée, est tenu de ne point quitter le condamné de toute la journée, afin de le maintenir dans la voie du salut. A partir de cette cérémonie le condamné doit être exécuté le troisième jour, si toutefois ce jour-là n'est point un Dimanche, ou un jour férié, dans lesquels cas l'exécution est remise au lendemain. L'exécution a lieu en public, sur une place désignée

time in the sight of all, placed under a gallows, or with his head placed on a block. If the criminal is of noble rank, a sword is moreover broken above his head by the executioner. This punishment is always accompanied by the loss of civil rights, with transportation and hard labour in the mines for a fixed or unlimited time. In general, every criminal or correctional punishment sanctioned by the Supreme authority, whether commuted or not, is carried out in full, and can only be subsequently commuted by an Imperial Manifesto, which frequently takes place during the reign of a Sovereign.

IV. Of late times the law has not undergone any change in the infliction of the Punishment of Death, neither more nor less, *i.e.*, that the crimes formerly punishable with death are equally so now. Thus, except the crimes above mentioned, and called State or political crimes, — crimes, which from their nature are more exceptional, and consequently very rare, —and the other kinds of crimes not involving capital punishment, no calculation can be made as to the increase or diminution of crimes punishable with death. In the same way it is impossible to show the proportion of the sentences of death and that of commutation of this punishment to something less severe.

V. The sentence of death may be carried into effect in three ways. The condemned is either shot, hung, or beheaded. But these different modes of applying capital punishment, not being specified in the law for one case or the other, the tribunal which pronounces the sentence ought to fix the mode in which it is to be carried out. As to the execution itself, it is carried out in the following manner:—

When sentence of death has been read out to the condemned, a week is allowed to him to confess and to prepare himself to receive the Holy Communion. If the culprit expresses a sincere repentance, the priest, after having administered it to him, is bound not to quit him during the whole of the day for the purpose of keeping him in the way of salvation. On the third day after this ceremony the condemned must be executed, provided such day is not a Sunday or a feast day, in which cases the execution is postponed till the morrow. The execution takes place in public, in a

à l'avance par le tribunal. Le jour fixé pour l'exécution de tel criminal est annoncé dans la localité par l'entremise de la police. Le lieu de l'exécution est entouré ce jour-là par des troupes, et le condamné y est amené également entouré d'une escouade de gens d'armes. Après la lecture à haute voix de la sentence, l'exécution a lieu, et le bourreau remplit son office jusqu'à ce que mort s'ensuive.

Observation.

Lorsqu'un arrêt de mort a été prononcé contre une personne inculpée des crimes mentionnés aux ss. 1, 4, 5, et 6, il n'y a point de prescription qui puisse invalider la sentence, quand même la personne incriminée serait introuvable, et ne comparaitrait point durant de longues années. Mais si depuis la perpétration du crime il s'est ecoulé un laps de tems de 20 années sans que ce crime ait été connu, dévoilé, poursuivis par des recherches, et des enquêtes, le coupable, au lieu de subir la peine capitale, dont il aurait été passible 20 ans plus tot, n'est condamné qu'à la déportation avec colonization dans les provinces éloignées de la Sibérie.

place before determined upon by the tribunal. The day fixed for the execution of such criminal is announced in the locality by means of the police. The place of execution is guarded on the day by troops, and the culprit is brought forward in like manner guarded by a squad of gendarmes. After the sentence has been read in a loud voice, the execution takes place, and the executioner performs his office until death takes place.

Observation.

When a sentence of death has been pronounced upon a person convicted of the crimes mentioned in Sects. 1, 4, 5, & 6, there is no prescription which can invalidate the sentence, although the guilty person cannot be found, and should not appear for many years. But if, since the commission of the crime, a period of 20 years should have elapsed without the crime itself having been taken cognizance of or unravelled, every search and inquiry having been made, the culprit, instead of suffering the punishment of death, to which he would have been liable 20 years previously, is only condemned to transportation with colonization to the distant provinces of Siberia.

The following letter, written by a Russian General, has been forwarded to the Commissioners by Mr. Michell, attached to the British Embassy at St. Petersburg:—

My Lords et Messieurs, St. Petersburg, le $\frac{25\text{ Décembre}}{6\text{ Janvier}}$ 186$\frac{4}{5}$.

La noble cause qui vous réunit, m'inspire de soumettre à votre bienveillante et haute sagesse quelques idées, meditées pendant bien des années d'expérience. On a tant dit et écrit sur ce sujet, que je serai bref.

Depuis que le Christianisme a fait un si profond progrès dans les cœurs, l'idée que *l'homme est l'image de Dieu* est devenu une vérité universelle, palpable pour chacun et tous. Cette idée est et doit être la base de tout. Pourrait-il en être autrement? Elle est la cause de l'amour particulier de Dieu pour l'homme qui a inspiré la rédemption. Après cela qui ose, après avoir mûrement réfléchi ce qu'est Dieu, s'attaquer à Son image, rachetée de plus par un sacrifice sans prix? Voici la véritable cause de la profondeur du crime d'un meurtrier. Est-ce que la loi peut, *en théorie*, approuver, légaliser ce qui est reconnu pour un mal absolu (non relatif)? Cela est plus que suffisant pour la théorie, je passe à la pratique.

Mais pour terminer, il faut penser combien la vérité que nous avons prise pour base est féconde pour l'avenir, quand, avec le progrès de la lumière, le brouillard de ce qui "parait et semble" se dissipera de plus en plus. Alors, l'homme immortel—dépositaire de la divinité et racheté de Jésus-Christ—appartiendra corps et âme à Dieu, et à Dieu seul. Dieu seul gardera le droit de le châtier. Alors, naturellement, la peine de mort, punitions, emprisonnements ne pourront plus trouver place dans le code pénal; l'emprisonnement ne pourra être toléré et logiquement excusé (par la nécessité) que comme mesure préventive. En effet, quelle loi morale ou économique peut expliquer la détention pour délit prouvé? Espérer la correction du coupable, serait absurde, c'est une de ces rêveries, bonnes intentions (comme l'inquisition), dont,

d'après le dicton, l'enfer est pavé ; quand à la sécurité pour la société, elle est bien mieux atteinte par la déportation du criminel. Un siècle d'expérience en Russie a prouvé que les déportés en Siberie, libres et colonisés, forment des citoyens utiles (mesure vraie dans le sens moral et économique), car les 9% des déportés se corrigent, tandis que dans les prisons les 9% se perdent définitivement. Ainsi desormais l'attribut de la justice serait seulement de prononcer son verdict. Aucune peine ne pourrait être appliquée, en vertu que le serviteur libre de Dieu ne peut être châtié que de Dieu. (Les amendes, comme l'indemnisation pour les dommages ne sont pas de cette catégorie.) En suite, le second et le *dernier* acte de la justice serait que la société (la ville, la commune, etc.), en vertu de son droit de conservation et son devoir de garantir la sécurité aux citoyens, aurait—sur tous les criminels reconnus par la justice *coupables*—droit de prononcer la *déportation* (ostracisme). L'état se chargerait des lieux d'exile, des frais de déportation (remboursables par le déporté ou par son travail dans les colonies), ainsi que de la décision dans les cas des crimes d'état, c'est-à-dire, où non une commune, mais tout le corps politique est menacé ou intéressé.

La prison ne servirait que pour la première arrestation ; le prevenu y serait detenu jusqu'à ce qu'il ne soit acquitté par la justice, ou bien, accusé, jusqu'à ce que la commune à la quelle appartient (par domicile) l'individu ne prononce son acceptation ou son éloignement. Mais cet état des choses est réservé pour un avenir éloigné, car le préjugé du droit et de la nécessité d'accompagner l'administration de la justice par des châtiments, de longtemps, comme nous l'avons dit, ne pourra disparaître parmi les hommes.

Pour répondre aux objections des gens qui se disent *pratiques*, et qui traitent l'abolition des peines de chimère, nous partagerons leurs objections en deux catégories :—1. Prévenir les crimes et moraliser les masses par la frayeur des châtiments est un mirage, un effet d'imagination. L'expérience prouve que même la peine de mort n'arrête par les meurtriers et les voleurs ; on vole même dans la foule qui se presse pour voir pendre un voleur ; à mesure qu'avance le progrès, à côté augmentent les convoitises, les tentations, la misère et le nombre des crimes augmente . . . . du reste la déportation viendra toujours au souvenir des hommes capable de mal faire et de s'arrêter devant un épouvantail ; et, 2. Il faut convenir qu'il y a des cas où les mesures répressives, même les plus rigoureuses sont urgentes. Ainsi, excepté la tuerie à la guerre et dans les cas de la défense personnelle, on pourrait tolérer la peine capitale, de part la loi, comme une nécessité, pour délits à la guerre, à bord d'un navire, dans le cas de sédition, où la loi, submergée, n'agit plus, ne garantie plus, pour la rétablir afin de garantir la sécurité contre un groupe d'ambitieux-revoltés qui s'impose à la masse tranquille. En Russie la peine de mort, abolie depuis plus d'un siècle par l'Impératrice Elisabeth, n'existe (excepté la loi martiale) que pour les cas d'attentat contre le Souverain et l'Etat, et encore elle ne peut être prononcée que par une haute cour criminelle *extraordinaire* (non permanente). Cette abolition, loin d'ébranler la discipline de l'ordre social, l'a fortifié ; le passage de plus de 20 millions de serf à la liberté, qui s'est effectué avec une admirable tranquillité, le prouve de la manière la plus manifeste. L'Empereur Alexandre II. a aboli les punitions corporelles, car l'image de Dieu doit être respectée même quand, par malheur, elle est trainée dans la fange.

Déduisons le principe : la peine de mort, de part la loi, ne peut être tolérée comme *principe*, mais seulement comme *nécessité*, quand *on ne peut faire autrement ;* elle restera comme un mal, tant que d'autres maux, comme la guerre, séditions, etc. existeront,—non comme *justice*, mais comme *force des choses ;* ainsi on la tolérerait dans le code militaire (marin), applicable dans les séditions et les cas de haute trahison.

Le moins punira l'homme, le plus agira Dieu et punira la conscience ; c'est là le véritable moyen de moraliser les peuples, adoucir les mœurs. La société, pour sa sécurité et sa conservation, aura une police (dans l'acceptation large) vigilante et clairvoyante, les arrestations immédiates et le droit de couper le membre dangereux—la déportation.

En soumettant à l'indulgence du Comité quelques lignes que j'ai tâché de rendre aussi courtes que possible, j'ajoute que le monde civilisé a, dans cette question, les yeux tournés vers Londres, et attend une solution qui ne peut être que la plus éclairée et la plus pratique.

St. Petersburg,
March 29, 1865.

My Lord,

As there is an impression in England that criminals are never capitally punished in Russia, which is indeed confirmed by a statement of the Russian Government on the subject, enclosed in my Despatch No. 17 of the 7th Dec. last, I have the honour to transmit herewith an extract from the St. Petersburg Journal of yesterday, reporting the trial of four persons who were condemned to death a few days ago at Novgorod.

Two of them were soldiers, and the trial took place before a military court, but the offence was one which would in England have been tried before a civil tribunal.

I have reason to believe also that several convicts employed in the works on the railway from Odessa to Balta, who have been guilty of murder and robbing, will be capitally punished.

I have, &c.

Earl Russell, K.G. (Signed) Andrew Buchanan.

Extract from "Journal de St. Petersburg," 16/28 March 1865.

"Le 7 Mars, la première application de la nouvelle procédure judiciaire orale a été faite à Novgorod par la commission de justice militaire chargée du jugement des bourgeois Aksénikine (âgé de 19 ans) et Kotow (âgé de 22 ans), du déserteur Yéfimow et du soldat en congé illimité Lidine, coupables d'avoir assassiné à Novgorod, au mois de Janvier, la veuve Leichtenfeld, dans le logement qu'elle habitait seule et que les assassins ont livré ensuite au pillage. L'affluence du public à cette audience a été si considérable qu'indépendamment de la salle d'audience, où n'avaient été admis, par billets, que les dames et un certain nombre de personnes de distinction, il avait fallu ouvrir à l'auditoire trois pièces attenantes, mais où malheureusement on n'entendait ni ne voyait rien.

"La lecture de ce procès assez compliqué, la vérification des dépositions faites par les délinquants, et en partie aussi des interrogatoires nouveaux, se firent *publiquement*, de dix heures du matin à deux heures de l'après-midi; après quoi, le public ayant été invité à se retirer, la commission s'occupa de la rédaction de la sentence. A cinq heures le public fut admis de nouveau, et la lecture de la sentence eut lieu.

"Les quatre assassins ont été condamnés, en conformité des dispositions du code militaire de compagne, à être fusillés; et le même jour tout le dossier ainsi que la sentence ont été envoyés par un exprès à St. Pétersbourg, pour la confirmation de l'arrêt rendu.—(*Gazette* (Russe) *de l'Académie.*)"

SWITZERLAND.

Canton of Zürich.

1. The punishment of death is awarded for the crime of murder. Premeditated incendiarism may also in certain aggravated cases be punished with death.

2. Not in the case of murder. No extraordinarily aggravated case of premeditated incendiarism has as yet taken place since the existence of the Penal Code, which was promulgated in the year 1835.

3. The most severe punishment, next to that of death, is that of confinement for life in chains, or that of confinement in the penitentiary or house of correction (Zuchthaus) with hard labour. In cases where the conduct of the convict has been good the remainder of the punishment may, after the lapse of twenty years, be commuted into banishment out of the Confederation, or out of the Canton, or into confinement within the bounds of the Commune for life. Confinement in irons is never applied to women, but is replaced by confinement in the house of correction for the same period.

4. No changes in this respect have been made in our Penal Code.

5. The execution takes place in public by means of the guillotine.

6. In seven cases which occurred since the year 1835, the sentence of death was passed upon 9 persons. In three cases (three persons) pardon was granted by the "Grand Council." In one case the person condemned to death committed suicide before the demand for pardon could be discussed. In three cases (five persons) the sentence of death was carried out.

Canton of Berne.

1. Murder, infanticide, robbery, if the death of the person robbed should be occasioned by the violence of the robber, incendiarism, when committed with evil intent or out of revenge.

2. No; the Court is bound to award the legal punishment. But the Court, whilst passing sentence, has the right to recommend the person condemned to death to the mercy of the Legislative Authorities, or to recommend a reduction of the punishment; and this right is invariably made use of when there are extenuating circumstances.

3. Next to death, confinement for life in chains (irons) is the punishment which follows in cases where mercy or reduction of punishment has been granted. But confinement in chains (irons) arising out of reduction of punishment may be further reduced to confinement in chains (irons) for a limited period, or into another kind of punishment, or may be completely cancelled, the right of mercy of the *Legislative* Authorities being perfectly unlimited.

The *Government*, that is to say, the *Executive* Authorities, have the right to reduce or to modify punishment only in petty offences or offences against police regulations, and then only to reduce one quarter of the punishment awarded.

4. The Federal Constitution of the year 1848 enacts the new principle that sentence of death may not be pronounced for political offences. Since then, no attempts have been made to overthrow existing governments or constitutions by force,* whilst these frequently occurred in the period 1831–1846; but the cause is to be sought not in the abolition of Capital Punishment for political offences, but in the promulgation of the Federal Constitution in general.

In the common Criminal Code no alterations such as those alluded to have taken place.

5. In public by the sword.†

6. From the year 1845 till now sentence of death has been passed upon 24 persons. 19 of those sentences were carried out, and in the five others the punishment was reduced.

Canton of Lucerne.

1. The following are punishable with death:—
   - *a.* Common poisoning, when any person loses his life in consequence thereof;
   - *b.* Incendiarism, under similar circumstances;
   - *c.* Murder (with the exception of infanticide);
   - *d.* The wilful causing of railway accidents, with similar results as those above mentioned.

2. The Court has that power (§ 72). Since the existence of the new law passed on the 29th November 1860, no offence punishable with death has been tried.

3. The most severe punishment, next to that of death, is that of confinement in chains (irons). 24 years confinement in chains are reckoned as equal to the punishment of death. When sentence of death is not pronounced, on account of extenuating circumstances, then the punishment next in degree must be applied; but this punishment again may be reduced by a quarter.

4. Changes in this sense were made at the revision of the Code in 1860. Crimes which were formerly capital are now no longer so, without their number having increased in consequence.

5. The sentence of death is executed publicly by decapitation. The executive decides whether the decapitation is to be performed by the sword or by the guillotine. No execution having taken place since 1860, it is not certain which, the case occurring, would be chosen of the sword or the guillotine.

6. As for many years (since 1846) no sentence of death has been passed in the Canton, and the former practice would no longer possess any value in consequence of the change in the legislation, no answer can be made on this point.

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* Excepting the events at Neufchâtel in the year 1856.

† On the 2nd of February of the current year (1864), the Great Council of Berne passed a resolution to the effect that executions are in future to take place in private (intra muros), and by means of the guillotine.

Canton of Uri.

1. Murder alone is expressly punishable with death. The Canton of Uri, however, is as yet without a complete Criminal Code.
2. Yes.
3. Confinement in chains (irons). After the convict has gone through two-thirds of the punishment of confinement in chains (irons) or in the house of correction, the remaining one-third may be abrogated,—and this *generally* occurs.
4. The law has not been altered.
5. Publicly through decapitation by the sword.
6. An act of clemency of this description is of rare occurrence in this Canton.

Canton of Schwyz.

It must first be mentioned that no Criminal Code exists in the Canton of Schwyz. The Tribunals, *on the recommendation* of the Cantonal Council, make use of the Criminal Code of Lucerne as far as regards determining the nature of offences and crimes; but as regards the mode and amount of punishment to be awarded, the Courts judge according to their free will.

1. Sentence of death is pronounced only in cases of *murder*.
2. In the absence of a Criminal Code this question cannot be answered with precision. Since the re-organization of the Criminal Courts in the year 1848 *one case* occurred (a case of infanticide) where the Cantonal Court considered the accused to be only in a measure responsible for the act, but notwithstanding pronounced sentence of death, which, however, was not carried out, pardon having been granted by the Cantonal Council.
3. The most severe punishment, next to that of death, is the punishment of confinement in chains (irons), which in the case of females is often modified into wearing an iron ring with a beak (Schnabel) round the neck.

When a person accused is found guilty of a capital crime on *indications* (circumstantial evidence), and therefore proof by witnesses or confession of the criminal are wanting, then the sentence awarded is that of *imprisonment in the house of correction* (Zuchthaus)* varying in duration from 30 years to imprisonment for life, or that of *confinement in chains* (irons) varying from 20 years to confinement for life.

If the punishment of confinement awarded in lieu of death is only for a certain number of years (that is, not for life), then pardon may be sought for after two-thirds or three-fourths of the punishment has been undergone, according as the person condemned has been punished for the first or second time for a criminal offence. After the third criminal condemnation pardon may be sought for only in case of sentence of death.

4. Up to the middle of the years 1830–40 Capital Punishment was awarded, according to former jurisprudence and according to the Code called the "Carolinian,"† which was then still in force, in cases of manslaughter and incendiarism, and this, owing to the influence of the more humane modern Codes of other Cantons, is no longer the case. There is no proof of an increase of those crimes in consequence of the diminution of punishment.
5. Capital Punishment is carried out in public by the sword.
6. No conclusive answer can be made to this question, very few sentences of death having been pronounced of late years. Since the year 1848 only two capital convictions have taken place, and in both cases the sentence was commuted, in the one on account of the youth of the condemned, in the other on account of feebleness of intellect (see case quoted in answer 2).

Canton Unterwalden ob dem Wald.

(To the President of the Confederation).

By your honoured letter of the 2nd instant you request, on behalf of the British Legation, replies to different questions respecting the application of Capital Punishment.

We are enabled to make the following communication on the subject.

According to the laws existing here, murder with premeditation (wilful murder) alone is punishable with death. When once sentence of death has

* With hard labour.

† Constitutio Criminalis Carolina (die peinliche Hals-Gerichts-Ordnung Kaiser Karls des Fünften), the Penal Code of the Emperor Charles the Fifth, issued in 1532.

been passed by the highest Criminal Court (the Cantonal Court) no change can be made in the sentence.

The sentence is executed in public by means of decapitation by the sword.

The most severe punishment, next to that of death, is first, that of confinement in chains (irons), and then that of confinement in the house of correction (Zuchthaus),* which punishments are awarded, according to the more or less aggravating nature of the crime, for various periods. In cases of lengthened confinement, when a certain portion has been undergone, then the rest of the sentence may be remitted by the Threefold Council.

Receive, &c.

(Signed) The Governing Landammann,

Sarnen, September 20, 1864. Dr. S. Etlin.

Canton of Unterwalden nid dem Wald.

The last sentences of death passed in this Canton were pronounced between the years 1810–1815, and in consequence of repeated aggravated robberies.

We have neither a written nor a printed Criminal Code, with the exception of a few very old laws respecting non-prescription of criminal offences, etc. etc.

Our replies follow :—

1. According to a very ancient law, Capital Punishment is decreed against any person proposing at the Sovereign or Legislative Assemblies (Landes-oder Hochgemeinden) to make an alteration in the titles of landed property or leases (Abänderung am Gülten-Buchstaben).

In our time Capital Punishment is principally applicable in cases of murder, although of late years no sentence of death has been pronounced in a case of murder with aggravating circumstances.

2. According to the Constitution of the Canton, § 33, the Criminal Court is the highest judicial authority, and judges all criminal offences, which according to law (this law, however, has not as yet been promulgated) are punishable by death or other heavy punishments.

In order to be legal, sentence of death must be pronounced by three-quarters of the members of the Court present.

The Criminal Tribunal consists of the President of the Tribunal of jury for the time being as president, of the members of the Tribunal of jury, and of the members of the "Landrath," with the exception of the members of the Weekly Council.

The Weekly Council (Wochenrath) which initiates, and prepares the evidence for criminal trials, decides whether the criminals are to be tried by the Criminal Court, or in cases where no sentence of death is likely to be passed, whether they are to be tried by the Tribunal of jury, which is the highest authority in civil as well as in police cases.

3. The various kinds of punishment in force in the Canton are :

1. Capital Punishment.
2. Confinement in the Zuchthaus, combined in aggravated cases with confinement in chains (irons).
3. Imprisonment.
4. Banishment from the country or detention within specified limits.
5. Corporal punishment.
6. Detention in the house of correction.
7. Fines.

4. Crimes which were formerly considered capital, such as theft for instance, are now no longer considered so. We cannot consider that such crimes have increased in consequence of this diminution of punishment.

5. The sentences of death are executed in public, through means of decapitation by the sword.

6. Sentences pronounced by the competent Tribunal are without appeal, that is, they cannot be modified in the way of dimunition of the punishment or in the way of mercy by any authority whatsoever, neither by the Council of the State, nor by the Assembly of the People (Landesgemeinde).

Canton of Glarus.

(To the President of the Confederation).

This Canton has no Criminal Code, properly so called. There are a few very incomplete and thoroughly antiquated provisions respecting different

crimes in the so-called ancient "Landesartikel." As regards Capital Punishment in particular, it is applied in the said articles to murder and homicide, but to no other crimes. In former times, and down to the beginning of this century, a law *founded on custom* punished with death robberies on the post and on the public bleaching-grounds, but the modern practice of the law is extraordinarily mild and is very much opposed to Capital Punishment. The last execution took place in the year 1836; several other cases which have occurred since, would from their nature have called for a sentence of death, partly because of the letter of the law of the ancient articles above mentioned,—which, however, expressly leaves in the hands of the Judge the consideration of any extenuating circumstances—partly in accordance with the practice of other Cantons; but no such sentence was passed, and since even in *a case of murder of a husband? or (wife?)* (Gattenmord) with aggravating circumstances, which occurred in the year 1858, the sentence was not one of death, Capital Punishment may be said to be abolished in practice, although in law there can be no doubt that the Courts would be legally entitled to continue to award it. Should such a case occur, then the person under sentence would still have the right to appeal to the mercy of the Threefold Cantonal Council (der dreifache Landrath). The latter is perfectly free to decide upon the question and degree of diminution of punishment; it may however, be taken for granted that as a rule the sentence would be that of confinement for life in the Zuchthaus, with hard labour. As regards the mode of execution, it takes place according to ancient custom and also by law, publicly by the sword.

As regards the question, whether the diminution of the punishment of death has produced an increase or decrease in the more serious crimes which formerly were capital, no conclusive answer can well be given respecting so small a territory as that of this Canton. It is so far certain that serious crimes, such as murder, robbery, incendiarism, rape, infanticide, are of rare occurrence in this Canton, and that at all events the mitigated spirit which has obtained in our laws, has not had any perceptible results as regards encouragement to, or increase of the criminal class.

Receive, etc.
The Landammann.
(Signed) Dr. J. Steer.

Canton of Zug.

(To the President of the Confederation.)

We find ourselves unable to answer the questions put by the British Legation respecting Capital Punishment, with any degree of completeness. We are as yet without a Criminal Code, and we have not made good this defect in our legislation by following the provisions of the law in force in other Cantons. In this state of the question the passing of sentence of death more or less depends upon the special views of the Judges for the time being, and on the general aspect of the crime which is being tried. Sentence of death is, however, very seldom passed, a tendency to a milder legislation having of late pervaded our judicial system. The power to remit punishment rests with our Great Council alone. Executions have hitherto always taken place in public.

Receive, etc. The Statthalter,
(Signed) M. Seller.

Canton of Fribourg.

1. The punishment of death no longer exists in the Canton of Fribourg. It was erased from the Penal Code in 1848.

2. No answer to make.

3. The punishment of hard labour for life. Every person condemned to hard labour is, at his request, set at liberty as soon as he has completed his 75th year.

Every person condemned to hard labour for life may solicit his pardon by the Grand Council, after having undergone 20 years of his punishment.

4. Since 1848, the period when the punishment of death was abolished in the Canton, the crimes for which that punishment was used appear to have increased in number. It cannot, however, be stated that this increase has resulted solely from the abolition of the punishment of death. It is doubtless the result of many different causes.

5. When the punishment of death existed in the Canton, the condemned was decapitated with the sword.

6. Before 1848 the punishment of death was frequently commuted by the Grand Council, the supreme authority, to hard labour for life.

Canton of Solothurn.

1. The crime of *murder*.

Incendiarism, when perpetrated with clearly premeditated danger to human life.

2. The Court has no power to reduce punishment; this power rests with the Cantonal Council alone, as being the only authority invested with the prerogative of mercy.

3. Confinement in the "Zuchthaus," with hard labour, with a maximum of 20 years.

4. Capital Punishment, which, according to the former legislation, was awarded in all cases of infanticide and of incendiarism, has now been restricted only to the two cases above mentioned. As yet no increase of crime is noticeable in consequence. The new Criminal Code is dated June 1859.

5. The sentence of death is executed in public by decapitation. As the State does not pay a special executioner, one has to be sent for from elsewhere for each special case.

6. Sentence of death is carried out only in the most aggravated cases, as for instance, murder with robbery, parricide, and so forth; in other cases the punishment is generally modified by the Cantonal Council.

Canton of Bâle-Ville.

1. The following crimes are punishable with death, according to our Criminal Law of August 1, 1846:—

a. High treason.

b. Treason against the country.

c. Murder committed in a state of excitement.

d. Rape, when accompanied by ill-treatment resulting in the death of the victim.

e. Wilful murder.

f. Exposing a child with intent to cause its death, and when such death ensues.

g. Robbery on the person, when resulting in the death of the person robbed, and when the robber was aware of the danger to the life of his victim.

h. Dangerous robbery or burglary when arms are used and the offence is committed for the third time.

i. Being in command of a band of robbers during the committal of a robbery.

k. Robbery, when the victim has been tortured with a view to extract confession respecting concealed property.

l. Robbery, when the victim has been wounded so as to be prevented for life from following his usual profession or trade.

m. Setting fire to arsenals, powder magazines, public granaries, hospitals, prisons, and public archives.

n. Setting fire to inhabited houses with danger to the person.

In all these cases, however, sentence of death can be passed only when the criminal has completed his twentieth year; in the case of younger criminals the law decrees confinement in irons in lieu of Capital Punishment.

2. When there are any extenuating circumstances, the Criminal Court may pass a sentence of confinement in chains, instead of a sentence of death, in the cases marked letters *a*, *b*, *c*, *d*, *h*, *n*. As regards letter *c*, the Court may also pass a sentence of confinement in irons in a case of child murder. Every sentence of death of the Criminal Court is legally subject to a revision by the Court of Appeal, which can either alter it or return the case for a new trial.

Further, every person condemned to death has the right to petition the Great Council for a commutation of the sentence into that of confinement in irons.

As regards the application of a milder scale of punishments, we call attention to the fact that during 44 years not a single sentence of death has been either passed or carried out in our Canton.

3. The most severe punishment, next to that of death, is that of confinement in irons for 24 years. Different minima of punishment are prescribed for different punishments, so that according to the degree of extenuating circumstances, when such exist, a shorter period of punishment than 24 years may be awarded.

The Great Council may remit one-third of the punishment awarded in the exercise of its prerogative of mercy.

4. Since the promulgation of our Criminal Code of 1846 no alterations such as those alluded to have taken place.

5. According to law the sentence of death has to be executed in a public place of execution by the sword.

6. This question cannot be answered, on account of the rarity of capital convictions in this Canton. Since the year 1820 no sentence of death has been passed in this Canton.

Canton of Bâle-Campagne.

1. *a.* Crimes against the State:—High treason, betrayal of the State, Insurrection.

b. Other crimes:—Common murder, assassination, murder with robbery, paid assassination, poisoning, murder of relatives (in which child murder is included), incendiarism.

2. The Court may, when there are extenuating circumstances, reduce the punishment below that of death, and this power is exercised whenever the case admits of it.

3. The most severe punishment, next to that of death, is that of confinement for 24 years in irons. This punishment is seldom carried out to its full extent, but is generally reduced by the "Landrath," in the exercise of its prerogative of mercy, to one half, when the convict has recommended himself to mercy by his good conduct during the time of punishment.

4. Respecting political offences, which formerly were capital, certain provisions have been introduced into the constitution of the country since 1850, which are in harmony with the Federal Constitution, and according to which Capital Punishment cannot be applied to such offences.

There has been no increase in those offences in consequence.

5. By the sword in a public place of execution.

6. In the period comprised between 1832 and the present year four sentences of death were passed by the Supreme Court. These occurred between 1835 and 1851. Three of these sentences were executed. The first on a man who had committed homicide (it was considered, with premeditation), the second on a woman convicted of poisoning, the third on a man who had committed murder during a robbery. The latter was a native of the Grand Duchy of Baden. The sentence not executed was passed on a woman convicted of incendiarism, a native of this Canton. A serious robbery with murder was committed in this Canton by a native of Baden; he was seized in his own country, condemned, and executed.

Canton of Schaffhausen.

1. The Penal Code of the Canton of Schaffhausen, of April 3, 1859, only makes the following crimes punishable with death:—

a. Murder (§ 143).

b. Violation of the rules of duelling in a duel.

If one of the principals or one of the seconds has either killed or wounded one of the other parties by an intentional departure from the rules, either traditionally existing or agreed upon, then the offender shall be punished according to the provisions respecting killing or wounding respectively (§ 122).

c. Incendiarism in cases where human life has been lost, and where the author of the deed might in all probability have foreseen such result (§ 153).

d. Poisoning, either dangerous to the general public (§ 140), or committed on one person (§ 144), when the result is the death of one or more persons.

2. Mere so-called extenuating circumstances cannot lead to the capital sentence being commuted to imprisonment (§§ 70 and 72). There is no mode of commuting a sentence of death by the law (see reply to question 6).

3. Detention for life in the "Zuchthaus," with hard labour.

4. In the Penal Code of 1834, which was superseded by that of 1859, the following crimes were considered capital besides those mentioned in reply No. 1 :—

High treason, betrayal of the country; homicide committed in a state of excitement; rape, when the death of the victim ensued; *child murder; robbery on the person,* when the victim was placed in danger of losing life or died; *theft* (when committed for the third time, and it was thus proved that the author of the crime was incorrigible); *leading a band of robbers; robbery,* when the victim's health suffered from the consequences, or when accompanied by cruel ill-treatment.

The number of these crimes, with the exception of theft, has not increased but diminished in the last 30 years.

5. The Penal Code of 1859 (§ 8) contains only *one* mode of executing the sentence of death, namely, decapitation by the guillotine, in an enclosed space, in the presence of 20 witnesses, who are delegated by Government for the purpose. An increase in the severity of the sentence never takes place. When several persons are condemned to death at once it is forbidden to execute any one of them in the presence of the others.

6. Every judicial sentence of death requires the consent of the supreme representatives of the people expressed by two-thirds of the Great Council. When this is not obtained, then the sentence of death is commuted to confinement for life in the "Zuchthaus" (§ 9).

No sentence of death having been passed since 1859, we are unable to state the proportion between the sentences confirmed or commuted by the Great Council. Capital Punishment was awarded for the last time in the year 1847.

Canton of Appenzell Ausserrhoden.

1. Our Penal Code punishes with death the following crimes, when the act is clearly proved by the confession of the accused :—

a. Wilful murder.

b. Incendiarism, when

1. a human being has lost his life in the fire, or has been injured with danger to life.
2. When the fire was set at a time when the inhabitants may have been supposed to be asleep, or when, for special reasons known to the incendiary, it would have been difficult to save life or put out the fire, or also without the above reasons when a great number of dwelling-houses have been laid in ashes.
3. When fire has been set to a house situated in a lonely position and the inhabitants have thus been placed in great danger of their lives.
4. When the incendiary has set fire to several places in groups of houses or villages, and the fire has broken out on one spot at least.
5. Setting fire in places where several dwellings have been endangered, when the firemen were absent, or a strong wind was blowing, &c.
6. Setting fire to, or near, buildings where quantities of powder are kept, always providing the offender was aware of this fact.
7. When fire has been set with the object of favouring the committal of some other serious crime, whether committed by the incendiary himself or by others.
8. When the criminal has already committed other acts of incendiarism.

2. The Judge is bound by the law, and in case of extenuating circumstances in a capital crime, he must sentence the criminal to confinement in the Zuchthaus (with hard labour) instead of to death.

When the law states the punishment without stating any lesser degree in it, the Court still can sentence to a milder punishment than the lowest ordained by law.

3. The most severe punishment, next to that of death, is that of confinement in the Zuchthaus (with hard labour), the longest duration of which is 20 years as a rule, and which in exceptional cases may be extended for life. As a rule, this punishment is carried out in full, and in any case one-half of it must have been undergone before a remission of punishment can even be thought of.

The reduction of punishment, on account of good conduct or other reasons, seldom exceeds one-third of the sentence, and is more frequently still less.

4. The new Penal Code dates from October 18, 1859. Before that the old Carolinian law* served as a Penal Code, more out of old custom than from the actual force of law, but every successive ten years have operated a change in favour of a milder legislation. According to that old criminal law, certain less serious crimes, such as manslaughter, arson, with extenuating circumstances, daring theft, &c., were considered capital and treated as such. The actual milder Penal Code has not led to any signs of increase in crime.

5. The sentence of death is executed by decapitation with the sword in a public spot; the wording of the law, however, does not exclude the use of the guillotine, should the authorities think proper to introduce it.

The sentence of death, passed by the highest Court, must in every case, whether an appeal for mercy has been made or not, be submitted to the Great Council, and may not be carried out without its consent.

6. When the Great Council grants a reprieve, the capital sentence may be commuted to one of confinement for life in the Zuchthaus (with hard labour).

Canton of Appenzell Innerrhoden.

1. In the absence of a written Criminal Law, the crimes punishable with death are only so out of tradition or custom; they may, however, at the present time, be said to be reduced to murder, incendiarism, and robbery with aggravating circumstances.

2. The competent Court (of Wochenrath) is free to pronounce any sentence, and makes use of this freedom, which is limited only by the laws of conscience. When a sentence of death has been passed, the Great Council have a right either to confirm or to commute the same.

3. The most severe punishment, next to that of death, is that of corporal punishment, in the shape of flogging by the executioner; besides that punishment there is that of imprisonment with forced labour for various periods, and when once decreed it is always carried out in full.

4. The sentences passed in former years prove that certain crimes were formerly considered capital, which are now no longer so. Crime in general is of very rare occurrence here; not one sentence of death has been passed since 15 years.

5. Sentences of death are executed by the sword, and the execution takes place in public.

6. No answer can be made for want of a basis of calculation.

Canton of St. Gallen.

1. According to the new Penal Code of St. Gallen, of June 11th, 1857, the crime of *murder* (homicidium præmeditatum) is punishable with death.

2. The Courts may put aside the punishment of death, and of their own free will substitute a minor infliction in cases where the criminals are not thoroughly responsible for their acts (verminderte Zurechnungsfähigkeit)—that is, when there are circumstances such, for instance, as intoxication or mental deficiency, etc.; which, supposing them to exist in a complete form, would render the offender thoroughly irresponsible, and when these circumstances exist in a less but still a sufficiently remarkable, degree (Art. 52).

In case of juvenile offenders over 11 but under 16 years of age, the regular legal punishment is, *in all crimes*, replaced by a correctional punishment suited to their age and to the gravity of the offence, in the shape of reclusion in a reformatory (or penitentiary). In the case of criminals above 16 but under 20 years of age, the Judge must, first of all, determine whether they possess sufficient powers of discretion and discrimination. In the case of the absence of such powers the punishment must be correctional.

When a person is found guilty on circumstantial evidence alone (Zuzichtenbeweis), the Judge cannot pass sentence of death, and confinement in the Zuchthaus (with hard labour) takes the place of Capital Punishment.

Trial by jury does not exist in the Canton of St. Gallen, and the Courts judge according to fixed rules of evidence.

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* Constitutio Criminalis Carolina (die peinliche Hals-Gerichts-Ordnung Kaiser Karls des Fünften), the Penal Code of the Emperor Charles the Fifth, issued in 1532.

3. The most severe punishment, next to that of death, is that of confinement for life in the "Zuchthaus" (with hard labour). (Art. 5 & 7).

Reply No. 2 explains the course to be followed by the Judge with respect to extenuating circumstances.

The Government (Executive) has no power to reduce punishment.

On the other hand, a sentence of death passed by the Judge may be reduced by the Great Council (Legislative) in the exercise of its prerogative of mercy, into confinement in the Zuchthaus; and further, the Great Council is not bound either to award any specified duration of punishment and is free to repeat the act of mercy.

In the course of the last 25 years three individuals sentenced to death, in the case of two of whom the punishment had been reduced to confinement for life, and in that of the third to confinement for 20 years in the Zuchthaus, further received a free pardon, after each had passed about 15 years in the Zuchthaus.

4. Before the year 1857, Capital Punishment was not only awarded in the case of murder, properly so called, but also in that of ordinary manslaughter (hostile bodily injury with evident danger to life, and killing in hot blood without previous bodily insult on the part of the victim; compare Arts. 144–152 of the Penal Code of 1819, and Art. 2 of the Law of Punishment for Criminal Offences of the year 1839). Before 1839 other crimes were considered capital. The reduction of Capital Punishment to the cases specified in Answer 1 has not occasioned an increase of the crimes formerly punishable with death.

5. Sentence of death used formerly to be executed by means of decapitation by the sword in public. The guillotine has since been introduced by the new Penal Code, and the execution is to take place in private (intra muros), in the presence of at least 12 witnesses hereto delegated by the Executive. Capital Punishment by the guillotine has as yet, however, not been carried out.

6. In the last 25 years, seven sentences of death have been passed (four for murder on relatives and three for murder with robbery), of which only one was carried out. The person executed was a father, who, with his wife and daughter as accomplices, had murdered his son-in-law. The sentences of death passed on the other two persons were reduced by the Great Council to confinement for life, and later to confinement for a limited period in the "Zuchthaus" (with hard labour).

In general the Great Council exercises its prerogative of mercy in the most humane manner.

Canton of Graubünden (Grisons).

1. According to the Penal Code of the Canton, *murder* alone (killing with intent) is punishable with death. *Child murder*, however, is excepted from this rule.

2. According to our Penal Code (§ 88), in cases of murder "a minor infliction can be applied *only when there are extenuating circumstances of a very exceptional character*, and such minor infliction can never be less than a sentence of 15 years imprisonment in the "Zuchthaus" (with hard labour). It is a fact, nevertheless, that the Cantonal Court, in order to avoid Capital Punishment, is in the habit of availing itself of this reservation *to a very great extent*, so that since the existence of this Criminal Code (1850) the punishment of death has never been applied.

3. The most severe punishment in our Penal Code, next to that of death, is that of *confinement for life in irons* (with hard labour), and this punishment has been hitherto regularly applied by the Cantonal Court in all cases of murder which have taken place since the existence of the new Penal Code. Paragraph 88, quoted in Reply No. 2, proves that punishment may further be reduced down to 15 years' confinement in the "Zuchthaus" (with hard labour).

4. The criminal legislation of the Canton of Graubünden previous to the year 1850 was much more severe than the present one. For instance, sentence of death *was of necessity* passed in *every case* of murder (child murder excepted), and thus executions were by no means of rare occurrence; nevertheless, capital crimes have not increased of late.

5. According to law executions are to take place *in public*, and by means of *the sword*.

6. The Cantonal Court never having passed a sentence of death since the existence of the present Criminal Law, the Great Council, to whom the prerogative of mercy of right belongs, have never been called upon to exercise it in the case of capital crimes.

Previous to 1850 neither the people nor the Great Council were inclined to extend mercy to criminals. The prerogative of mercy of the Great Council only dates, however, from the year 1845.

Canton of Aargau.

I. The Penal Code of Aargau of February 11th, 1857, makes the following crimes punishable with death :—

(*a*) Murder (§ 108).

(*b*) Poisoning dangerous to the general public (such as poisoning of wells, or of articles of food exposed for sale, drinks or other things) which may occasion loss of life (§ 135).

(*c*) Incendiarism,

1. When fire has been set to an inhabited building, in consequence of which a person has been either killed or severely injured, and when the incendiary foresaw such consequence.
2. When fire was set with the object of placing one or more persons in danger of their lives.
3. When fire has been set to an inhabited building, roofed in with straw or shingles, in the night time, when the inhabitants have retired to rest, and when the fire has broken out.
4. When the offender has set fire to several buildings in the same place or village at once, and the fire has broken out at least on one spot (§ 169).

(*d*) Any injury dangerous to the general public (gemeingefährliche Beschädigung), (by which entire villages or districts are imperilled or damaged, or by which persons are exposed to loss of life or bodily injury, and when this could be forseen by the criminal), when any person lost his or her life in consequence.

2. The Criminal Court has no power, in a capital charge, to pass any other sentence than that of death (§ 38). In such cases recourse is had to the mercy of the Legislative. Out of five sentences of death passed since the new Penal Code has come into operation, pardon was granted in four cases.

3. The most severe punishment, next to that of death, is that of confinement for 24 years in the "Zuchthaus" (with hard labour). The Great Council, however, is not bound to decree such limited punishment in pardoning a person condemned to death, and one of the criminals pardoned, mentioned in Reply No. 2, was sentenced to confinement for life in the "Zuchthaus" (with hard labour). (The reprieve in this case was granted, not on account of extenuating circumstances, but because the verdict of "guilty" pronounced by the jury rested on circumstantal evidence alone, the offender persisting in a most obstinate denial of his guilt. The same criminal has, however, since made a full confession.)

The reduction of punishment in the form of confinement in the "Zuchthaus," which takes the place of Capital Punishment is not to be carried out in full (unless the sentence be passed for life), and in case of good conduct on the part of the convict, he may after a certain time be set at liberty on certain conditions (future good behaviour). In the case of criminals condemned to confinement in the "Zuchthaus" (with hard labour) for life, the sentence can only be modified by a second reprieve.

4. The above-mentioned Penal Code of 1857 replaced that of 1804. The latter applies Capital Punishment to the following crimes, which the former either does not specify at all, or at most punishes with confinement in the "Zuchthaus," varying from 20 to 24 years :—High treason, betrayal of the country, insurrection, setting fire to magazines the property of the State, child murder, robbery with wounding of the victim. Capital Punishment used also to be awarded in the case of a thief who had already been punished twice and was considered incorrigible (unverbesserlich), and in the case of the leader of a gang of thieves.

No increase in crime is noticeable which could be attributed to diminution of punishment.

5. The execution of the sentence of death may take place either by the sword or by the guillotine. The execution takes place in private according to a Government Ordinance of the 17th February 1860.

6. Answered in the last sentence of Reply No. 2.

Canton of Thurgau.

1. By our Cantonal Penal Code of June 15th, 1841, the following crimes are punishable with death:—

a. Murder, that is, taking the life of another with premeditation.

b. Poisoning, even when the intention of the poisoner was not to kill, but only to injure, when, however, death ensues.

c. Exposing helpless children or other helpless persons, with the object of killing such persons exposed, and when death was the consequence.

d. False testimony or a false legal opinion (Gutachten) when a sentence of death based thereupon has been carried out upon an accused person who either deserved no punishment at all or a lesser punishment, and when such false testimony or legal opinion has been concocted previously by two or more witnesses or professional persons (Sachverstandige) and was uttered with the object of bringing about such sentence of death.

e. Incendiarism when any one person has perished in the fire, and when the incendiary could foresee such consequence.

2. In all crimes punishable with death the competent Tribunal of jury or the Criminal Chamber can deliver no other sentence than that of death.

3. The most severe punishment, next to that of death, is that of confinement for life in the "Zuchthaus," which consists in the convicts condemned to such punishment being kept at work in the interior of the prison, separated from the other convicts, bound to unbroken silence both day and night, and loaded with irons during the whole period of their servitude; the only convicts excepted from the latter infliction being females or weak and infirm males. This punishment may also be inflicted for a lesser period than for life. When a sentence of confinement for life in the "Zuchthaus" has through an act of mercy taken the place of Capital Punishment, such sentence cannot be altered, and is invariably carried out in full; it should be observed, however, that very lately the Great Council has requested the Government to examine the question as to whether the law respecting pardon of criminals might not be revised in a milder sense, and specially whether rehabilitation of the criminal might not be rendered possible.

4. Our Penal Code was published in the year 1841, and replaced the Helvetic Penal Code of March 4th, 1799, which had been in force till then. The Penal Code has not been altered since the year 1841, so that the question whether certain crimes formerly capital have now ceased to be so, may be answered in the negative; and it may further be added, that in practice the views obtained in criminal legislation have not altered.

5. By our Penal Code the sentence of death must be executed in public by the sword; the punishment may not be made more severe.

6. We cannot well answer this question for want of experience, for the Judge in this Canton fortunately very seldom finds himself constrained to pass sentence of death. For instance, such a sentence has not been passed since the year 1854; on the other hand, very few appeals to mercy on the part of persons sentenced to death have been acceded to hitherto in this Canton.

Canton of Ticino.

1. By the law in vigour the punishment of death is restricted to murder.

2. When the jury have found a verdict of "guilty" respecting a crime which is punishable with death, the Criminal Chamber alone has power to reduce the punishment of death to that of penal servitude for life, and only when there are extenuating circumstances.

3. The most severe punishment, next to that of death, and the one awarded in cases where sentence of death is reduced by the Criminal Chamber or commuted by the mercy of the Great Council, is the punishment of hard labour for life, and this may later on be reduced by a further decree of the said Great Council.

4. The Penal Code of 1816 has undergone different modifications; certain crimes, formerly capital, have ceased to be so; the law of December 19th, 1822, had made an alteration in several provisions of the Code, especially respecting homicide (manslaughter), extending the cases in which the punishment of death was to be inflicted. By the Code and by the above-mentioned law, offences against the safety of the State and the other States of the Confederation were punishable with death, as well as robberies committed with violence, or by attack on the high roads; but as early as 1837, considering that the increase of punishment had not produced a diminution of crime; and later, in 1842, considering that the penalties contained in the Code were quite sufficient in the state of progress and civilization of the republic, the said law of December 19th, 1822, was repealed; further, a partial reform took place on January 20th, 1851, by which, in harmony with the Federal Constitution, punishment of death and all degrading punishments, with the exception of the loss of civic rights, were abolished for all political offences; finally, the last law was passed on the 12th May 1863, by which murder alone remains a capital offence.

5. The sentence of death is executed in public by beheading, and every aggravation of the punishment is prohibited; in certain special cases the punishment is made more exemplary, as for instance, for persons guilty of parricide (both murder of parents and murder of children), for persons guilty of murder of the supreme authorities of the republic, for persons guilty of poisoning, or of homicide by means of fire, or of certain gross outrages on the public roads; in these cases the criminal condemned is led to execution barefooted, habited in a red shirt and with a black veil over his head; after the execution the head is fixed upon a stake and exposed to the public view till sunset, with an inscription in large letters, describing the name, surname, and country of the criminal, and the aggravating circumstances of the deed committed by him.

6. The executions that have taken place since 1840, and even further back, have not exceeded two in number, and the sentences of death passed are very few, but the commutations, by the Great Council, of such sentences to the punishment of hard labour remain, and will continue to remain, it is to be hoped, much more numerous in proportion than the executions, till the day when Capital Punishment shall be completely abolished, a day not far distant now.

Canton of Vaud.

1. Crimes against the independence of Switzerland or of the Canton.

Crimes having for their object the overthrow of the Federal Constitution, or that of Vaud or of the Government of the Canton or of the Confederation.

For carrying arms against the Canton or the Confederation.

False testimony or declarations by which the punishment of death has been brought upon an innocent person.

Rape or attempts accompanied by wilful homicide.

Repetition of wilful homicide, assassination, poisoning, parricide, fratricide, murder of a wife by the husband, murder of a public functionary.

Robbery or extortion with wilful homicide.

Incendiarism which has caused death, which might have been foreseen. (Penal Code of Vaud, 1843, arts. 91, 93, 94, 96, 97, 109, 110, 95, 190, 204, 211, 212, 279, 280, 316.)

Destruction or wilful damage to railways, which has caused death. (Police law as to railways, Dec. 5, 1851, arts. 15 and 16).

2. In the case of a capital crime, the question whether there are extenuating circumstances is always put to the jury, and if the answer is in the affirmative, the Judge may commute the punishment to confinement for 15 to 30 years.

There must a commutation of it to confinement or imprisonment for 10 years at most, when the crime has been committed in self-defence or under violent provocation.

(Code Penal, arts. 61 and 59.)

In addition to which cases the punishment of death, although pronounced, is not carried out:—

(1.) Upon the condemned if under 20 years of age.

(2.) If the condemned be 70 years of age.

(3.) Upon a pregnant woman.

(4.) When three years have elapsed between the crime and the trial.

3. Under the law of Vaud the most severe punishment next to that of death is confinement in the penitentiary for 30 years.

In the case of extenuating circumstances, see answer to Question 2 above.

4. The 54th Art. of the Federal Constitution forbids the punishment of death for political offences, so that it can no longer be pronounced for crimes of that nature mentioned in Question 1.

5.In public and by the sword.

6.This punishment, very rarely pronounced, has never been commuted by pardon to my knowledge.

The Grand Council may pardon or commute the punishment. (Code of Criminal Procedure, February 1, 1850, art. 557 and following.)

Canton of Valais.

1. Parricide, assassination, and poisoning; but the punishment of death cannot be applied when there is only proof by circumstantial evidence.

For infanticide the maximum punishment is 25 years' confinement.

2. The tribunal may reduce the punishment of death to perpetual confinement if there is a combination of circumstances which considerably lessens the guilt of the criminal.

There is no case in which the tribunal has made use of this power.

3. Perpetual confinement in chains. There has been no case in Valais where the punishment of death has been commuted for that of perpetual confinement. When the punishment of death has been pronounced it has always been carried out, but the cases are rare in which it can be applied.

4. No.

5. The punishment of death is publicly executed by beheading.

6. No instance.

Canton of Neuchâtel.

1. The punishment of death no longer exists in our Canton.

2. No answer to make.

3. The most severe punishment in the Canton of Neuchâtel is imprisonment for life with hard labour.

4. The Penal Code of Neuchâtel being subsequent to the abolition of the punishment of death, there has naturally been no change in the sense implied by the question.

5. No answer to make.

6. No answer to make.

Canton of Geneva.

1. The Canton of Geneva has retained the French Penal Code of 1810. This Code at present regulates all penal matters with us. It would be difficult to enumerate all the cases for which this code provides Capital Punishment, because it would involve the mention of a number of circumstances which must accompany the deeds to render them liable to this punishment. We must therefore confine ourselves to the enumeration of capital crimes, without entering into an examination of details, which would extend the answer to a greater length than is required.

The crimes which our law punishes with death are:—

Crimes against the external or internal safety of the State. (It is, however, proper to remark that since the Federal treaty, which modified the sovereignty of the Cantons, the articles which define these crimes are in some measure without possible application.) Counterfeiting gold or silver money of legal currency in Switzerland; of State seals; of bank notes authorized by law; and uttering the like when counterfeited or altered. Violence used against the depositaries of public authority (according to the circumstances).

Assassination, parricide, infanticide, poisoning, murder preceded, accompanied, or followed by another crime or misdemeanor. Castration which has caused death. Illegal arrests or shutting up persons. Perjury or subornation of perjury which has caused a sentence of death to be passed.

Robbery (when there has been a combination of five circumstances provided by article 381). Incendiarism, destruction of and pulling down buildings,

followed by homicide or injuries. Attempts at all crimes involving punishment of death. And, lastly, all crimes punishable with hard labour for life committed a second time.

2. When a person is adjudged guilty of a capital crime, the jury may admit in his favour extenuating or very extenuating circumstances. If the jury admit extenuating circumstances, the Court pronounces the punishment of hard labour for a time or confinement. If very extenuating circumstances, the Court pronounces sentence of imprisonment for five years or under, without limit. (Art. 72 and 73 of the law of the Jury of 12th January 1844). Men of experience generally show a wish to see the 72nd article altered, so that the Court should have power to pronounce sentence of hard labour for life when the jury admit extenuating circumstances. It seems in reality that such an alteration would establish a more just gradation in the scale of punishments. The present law, which is very severe, and little in accordance with present feelings, is generally applied with great leniency. When the death of a man has not been occasioned, the jury almost always admit extenuating circumstances in favour of the accused, and as often in other cases, according to the particular facts on which they are called upon to decide.

3. The next most severe punishment to that of death is that of hard labour for life. We have already above said (answer 2) in what the reduction of the punishment consists when the jury admits either extenuating or very extenuating circumstances. If a person is condemned to the punishment of death, the Grand Council has the sovereign power either of granting him a full and entire pardon, or of commuting the punishment in the way it thinks fit. Practically, in the cases which occur, the Grand Council commutes the punishment of death to that of hard labour for life. No obstacle exists to a culprit whose sentence has been once commuted obtaining a second commutation lessening the duration of his punishment.

4. The law of Geneva has not undergone any change in the clauses which provide for the punishment of death. A proposition was made to the Grand Council in 1863 for the revision of the penal code. A Commission has been appointed for this purpose, but it has not yet made its report. Whatever that may be, the complete revision of this part of our law is imminent. Opinions are divided as to the punishment of death, one party wish to see its total abolition, the other to limit its application to the restriction of the most atrocious crimes.

In the opinion of the latter party, the punishment of death should be restricted to five or six cases; for example, poisoning, parricide, murder with premeditation or lying in wait, incendiarism which has involved the death of one or more people. At the time of the last Constituent Assembly in 1862, a member proposed an article thus worded: "*Human life is inviolable.*" This proposition was supported, but notwithstanding it did not obtain a majority.

5. The mode of execution of the punishment of death is beheading by the guillotine. The execution takes place in public, in the usual place for executions.

6. Since 1847 there have been five sentences of death; three condemned persons have been executed, the other two obtained a commutation of their punishments to hard labour for life. Of the two latter, the one guilty of the attempt to murder, accompanied, preceded, or followed by robbery, has definitively obtained his pardon after an imprisonment of 11 years; the other, a woman guilty of poisoning, and who only obtained a commutation of punishment by reason of her sex, is still in confinement, and has constantly failed in the requests she has made to obtain a fresh commutation of her sentence.

Bureau Fédéral de Statistique,
Bern, 16th February 1865.

DEAR SIR,

IN a letter, dated from the 9th inst., Mr. William Tallack writes our Department to give you further explanations in relation to a discrepancy existing between the statement of the Department and of the Canton Freiburg, with respect to the statistical consequences of the abolition of punishment of death in that canton (1848).

After having ordered a new examination, a statistical abstract of the official Court of Law lists of the Canton Freiburg in the 15 years before and 15 years

after the abolition of Capital Punishment lies before us—a statement of which a copy is at your disposal. This statement confirms exactly the first account of the Department.

"That crimes against life and *health* have *not* increased relatively [to the increasing of population] in the 15 years after abolition of Capital Punishment."

Nevertheless the statement of Canton Freiburg is exact to: crimes against life having indeed increased in number above the proportion of increasing population, as you can see from the following tabula:—

Crimes in general in the Canton Freiburg.

From 1833–1847	- 984	by 1023 persons:	population of	1831, 86,169.
„ „	- -	„	„	1850, 99,805.
„ 1848–1862	- 1091	„ 1135	„	1860, 105,523.

Crimes against Life and Health.

1833–1845	- - - - - 169.
1848–1862	- - - - - 139.

Crimes against Life.

1833–1847	- - - - - 19.
1848–1862	- - - - - 45.

Of the last:	Kindsmard (infanticide)	has increased	from 8	to 15.
„	Tootschlag (meurtre)	„	„ 5	„ 15.
„	Mard (assassinat)	„	„ 1	„ 5.

Notwithstanding you would be mistaken, if you might attribute this increasing to the abolition of Capital Punishment as it has been merely accidental, Canton Freiburg being a very small canton, the third part of the criminals being foreigners to the canton, this example cannot be of any prejudice to the question.

I remain, Dear Sir,
Yours most respectfully,
DUBS,
Chief of the Department
of the Interior.

James Henry Patteson, Esq.,
Secretary of Her Majesty's Royal Commission
on Capital Punishment.

DENMARK.

The information which can be given in answer to this question is not of great practical importance, inasmuch as the capital punishments which the present law prescribes (an obsolete law, and one which it is hoped will be soon replaced by a new Penal Code), are in many cases commuted by way of pardon to much lighter and sometimes very insignificant punishments.

In conformity with the laws now in force the punishment of death is pronounced for the following crimes:—

A. *Crimes against the Public State.*

Under the Danish Code, book VI. c. 4, art. I., the punishment of death is pronounced for acts of violence and threats against the King or Queen, as well as for murder, committed or attempted, of the Royal Princes or Princesses.

Les éclaircissements qu'on est à même de fournir sur ce point ne sont pas d'une grande importance pratique, vu que les peines capitales que prescrit la législation en vigueur (législation surannée, qui, on l'espère, fera bientôt place à un nouveau Code Pénal) sont dans bien des cas commuées par voie de grâce en des peines plus légères, quelquefois même assez insignifiantes.

Conformément aux lois en vigueur la peine de mort est prononcée pour les crimes suivants:

A. *Crimes contre la Chose Publique.*

D'après le Code Danois, livre VI. chap. 4, art. I., la peine de mort est prononcée pour coups et graves outrages par parole dirigés contre le Roi ou la Reine, ainsi que pour meurtre, accompli ou attenté, des Princes et Princesses Royaux.

Under the Danish Code, book VI. c. 4. art. II., acts calculated to alter by illegal means the constitution of the country are punished with death.

Under the Danish Code, book VI. c. 4, art. III., rebellion and high treason are punished in like manner.

The punishment of death is in like manner pronounced under Art. IV. for having levied the militia or other Royal troops without the authority of the King. (Under this article, however, the punishment of death may be replaced by that of loss of honour or by confiscation of goods.)

Under Book VI. of the same Code, chap. 4, art. 6, the punishment of death is pronounced for having in time of war entered the army of the enemy, not having been forcibly constrained to do so. For having carried arms against the King. For having held communication with the enemy. For having fraudulently delivered to the enemy goods belonging to subjects of the King.

Under sec. 47 of the law of June 5, 1849, for having made attempts against the safety and liberty of the Rigsdag, for having given instructions for such attempts, or for having complied with such instructions.

B. *Crimes against Religion.*

Under the Danish Code, Book VI., c. 1, art. VII., VIII., whoever shall have spoken blasphemy against God, or who shall have outraged His Holy Name, His Word, or His Sacrament, shall be punished with death.

C. *Crimes involving Attempt against Morals.*

The punishment of death is prescribed for the following crimes:—

Bestiality.
Incest.
Bigamy.
For having thrice seduced girls or chaste widows.
Rape.
For a near attempt at rape.
Adultery, when the crime has been thrice committed, and when only one of the parties is married.
Double adultery, *i.e.*, where both parties are married, and accompanied by aggravating circumstances.

N.B. The punishment of death under letters B. and C. is never carried out.

D'après le Code Danois, VI. chap. 4, art. II., sont punies de mort les actions destinées à changer par voie illégale la constitution du pays.

D'après le Code Danois, VI.,chap. 4, art. III., est punie de la même peine bellion et haute trahison.

La peine de mort est également prononcée d'après le Code Danois, VI., chap. 4, pour avoir, sans autorisation du Roi, levé la milice du pays ou d'autres troupes Royales. (Cependant, d'après cet article, la peine de mort peut être remplacé par la peine de la perte de l'honneur ou par celle de la confiscation des biens.)

D'après le Code Danois, VI., chap. 4, art. 6, pour avoir en temps de guerre pris service dans l'armée de l'ennemi, sans y avoir été contraint par force, pour avair porté les armes contre le Roi, pour avoir entretenu des intelligences avec l'ennemi, ou pour lui avoir frauduleusement délivré des objets appartenant aux sujets du Roi.

D'après § 47 de la loi fondamentale du 5 Juin 1849, pour avoir attenté à la sûreté et à la liberté du Rigsdag, pour avoir donné des ordres dans ce but, ou pour avoir obtempéré à de tels ordres.

B. *Crimes contre la Religion.*

D'après le Code Danois, VI., I., VII., VIII., sera puni de la peine de mort quiconque aura proféré des blasphêmes contre Dieu, ou qui aura outragé Son Saint Nom, Sa Parole et Ses Sacrements.

C. *Crimes impliquant des Attentats aux Mœurs.*

La peine de mort est prescrite pour les crimes suivants:—Pour le crime de la bestialité; pour inceste; pour bigamie; pour avoir trois fois de suite séduit des filles ou veuves honnêtes; pour le crime de viol, et pour l'attentat le plus proche au viol; pour l'adultère, lorsque le crime a été trois fois commis, et que seulement une des deux parties est mariée; pour l'adultère double; c'est à dire, lorsque les deux parties sont mariées, accompagné de circonstances aggravantes.

N.B. La peine de mort pour les crimes mentionnés sous litr B. et C. n'est jamais exécutée.

D. *Crimes against the Person and Property.*

1. When the death of any person results from a crime committed the punishment of death is pronounced for the wilful injuries inflicted in the attempt to kill the person attacked.

For blows given with premeditation, and for the crime of arson wherever the death of any person might have been foreseen as the natural consequence of these two crimes.

For robbery, for perjury, and for destroying railways, even when the death of any person has been the purely accidental consequence of the act.

2. Although the death of a person has not resulted from the crime, the punishment of death is alike prescribed—

For a premeditated attempt to murder.

For robbery, and for perjury when the crime has been committed in the endeavour to endanger the life of any person.

For arson, and for destruction of railways, when it clearly appears from the circumstances that human life has been endangered.

For robbery, when considerable injury has been inflicted, although accidentally, to the individual attacked.

For arson, when the crime was calculated to bring about results very dangerous to the public, as furnishing an opportunity for plunder, &c.

For having exposed or abandoned an infant in a desert place.

For having given or accepted a challenge to a duel, if a fight results from it, as well as for having assisted in a duel in the capacity of second.

For having participated in the crime of piracy, and for having abetted the crime.

2. When the proof of a crime punishable with death is only founded on presumption, the Courts have the power of substituting the punishment of hard labour for life for the punishment of death. But the Courts can never in consideration of extenuating circumstances dispense with the necessity of pronouncing the sentence of death. The Courts, however, never make use of the above power.

3. Hard labour for life.

But the punishment of death is, as it has been said above, very often replaced by inferior, sometimes even by very light, punishments. In the hea-

D. *Crimes contre les Personnes et les Propriétés.*

1. Lorsque la mort d'une personne est résultée du crime commis, la peine de mort est prononcée pour des coups volontaires portés dans le but de tuer la personne attaquée.

Pour des coups portés avec préméditation et pour le crime d'incendie, toutes les fois que la mort d'une personne devait être prévue comme une conséquence naturelle de ces deux crimes.

Pour brigandage, pour faux témoignage, et pour dévastation des chemins de fer, lors même que la mort d'une personne a été la suite purement accidentelle de l'action.

2. Quand même la mort de personne n'a été le résultat du crime, la peine de mort est également prescrite—

Pour attentat au meurtre avec préméditation.

Pour brigandage et pour faux témoignage lorsque le crime a été commis dans un but dangereux pour la vie d'une personne.

Pour le crime d'incendie et pour dévastation des chemins de fer lorsqu'il appert clairement des circonstances que des vies humaines ont été mises en péril.

Pour brigandage, lorsqu'une blessure considérable a été faite même accidentellement à l'individu attaqué.

Pour le crime d'incendie, lorsque le crime était destiné à amener des suites très-dangereuses pour le public, comme en fournissant l'occasion au pillage.

Pour avoir exposé et délaissé un enfant en un lieu solitaire.

Pour avoir donné ou accepté une provocation à duel, si un combat en est résulté, ainsi que pour avoir assisté à un duel en qualité de second.

Pour avoir participé au crime de piraterie, et pour avoir favorisé ce crime.

2. Lorsque pour un crime puni de la peine de mort la preuve n'est fondée que sur des indices, les Tribunaux ont la faculté de substituer la peine de travaux forcés à perpétuité à la peine de mort. Mais les Tribunaux ne pourraient jamais en considération de circonstances atténuantes se dispenser de prononcer la peine de mort. Les Tribunaux n'ont du reste jamais fait usage de la susdite faculté.

3. Travaux forcés à perpétuité.

Mais la peine de mort est très-souvent, comme il a été dit plus haut, remplacée par des peines moins fortes, quelquefois même par des peines assez

vier cases, where the punishment has been altered to that of hard labour for life, the diminution of the punishment is not absolutely certain, the convict being often set at liberty after a greater or less number of years. It is scarcely possible to fix the limit for the reduction of the punishment.

When it is a case of the heavier crimes (meurtre ou assassinat), the setting at liberty is only granted after a detention of 16 years.

For infanticide, when the crime has been committed immediately after the birth of the child, the convict is often set at liberty after a space of six or eight years.

4. The Danish law has not of late undergone any change of the nature indicated; but the draft of a new Penal Code is about to be submitted to the representative assembly of the kingdom, by which the number of crimes punishable with death will be considerably diminished, since this will only be retained for the cases mentioned in ss. 70, 77, 80, 86, 90, 187, 188, 240, 276, 281, 282, and 283 of the new Code.

5. The execution is carried out in a public place by means of beheading. (Hanging is only in usage in the West Indian possessions of the King). Under s. 10 of the above-mentioned draft of the new Penal Code, the execution will be carried out in a public place by means of the guillotine, and the body of the executed criminal will be buried without display. When many persons must undergo the punishment of death at the same time, any of them must assist at the execution of the others.

légères. Dans les cas les plus graves, où la peine a été changée en travaux forcés à perpétuité, l'abaissement de la peine n'est pas absolument définitif, le condamné étant souvent mis en liberté après un nombre d'années plus ou moins grand. Il n'est guère possible de fixer la limite pour la réduction de la peine. Lorsqu'il s'agit de graves crimes (meurtre ou assassinat), la mise en liberté n'est guères accordée qu'après une détention de 16 années. Pour infanticide, lorsque le crime a éte commis tout de suite après la naissance de l'enfant, la liberté est souvent rendue à la personne condamnée après une espace de temps de six à huit ans.

4. La législation Danoise n'a dernièrement subi aucune modification de la nature indiquée, mais on vient de soumettre à l'assemblée représentative du royaume le projet ci-annexé d'un nouveau Code Pénal, par lequel le nombre des crimes punis de la peine de mort sera considérablement amoindri, puisque cette peine ne sera conservée que dans les cas mentionnés dans les ss. 70, 77, 80, 86, 90, 187, 188, 240, 276, 281, 282, et 283 du projet.

5. L'exécution se fait sur une place publique par la hache. (La strangulation n'est en usage que dans les possessions du Roiaux Indes Occidentales). D'après le s. 10 du projet sus-mentionné, l'exécution aura lieu sur une place publique par la guillotine, et le corps du supplicié sera inhumé sans aucun appareil. Lorsque plusieurs personnes doivent subir la peine de mort en même temps, aucun d'eux doit d'après ce même section assister à l'exécution de l'autre.

—	No. of Capital Sentences.	No. of Criminals executed.
1848	16	—
1849	17	—
1850	12	1
1851	10	—
1852	12	1
1853	12	3
1854	13	2
1855	13	1
1856	15	1
1857	23	—
1858	12	1
1859	6	3
1860	16	1
1861	21	2
1862	36	—
1863	16	1

—	Nombre des Arrêts portant peine capitale.	Nombre des Suppliciés.
1848	16	—
1849	17	—
1850	12	1
1851	10	—
1852	12	1
1853	12	3
1854	13	2
1855	13	1
1856	15	1
1857	23	—
1858	12	1
1859	6	3
1860	16	1
1861	21	2
1862	36	—
1863	16	1

SWEDEN.

The following information is based upon the new Penal Code which obtained the Royal assent on the 16th February last, and which comes into operation on the 1st January 1865.

The punishment of death is certainly retained in the new Penal Code for certain crimes, but nowhere in a positive manner; that is to say, that where the law declares the punishment of death, that of hard labour for life is established by the side of the former as an alternative; so that the judge is authorized to pronounce either the sentence of death or that of hard labour for life, according to the circumstances of the case, whether aggravating or extenuating.

It must be observed that the power of pronouncing the punishment of death belongs to the Court, the jury in Sweden only existing "pour les délits de la presse." Since the Code is not yet in force, it is impossible to form any opinion as to what extent the judges will apply the lesser punishment.

The crimes for which the punishment of death may be pronounced under the new Code are as follows:—

High treason and some other crimes aimed at the external or internal safety of the State.

Attempts made against the person of the King.

The murder of any other member of the Royal Family.

Assaults on those who represent the King in the Government, if made with the object of disturbing the freedom of their deliberations, or of their decisions, or of preventing their meetings.

Murder by the mover of sedition on the person of him who endeavours to appease it.

Murder, including poisoning, if it results in the death of any one; as well as fraud at the time of a duel, if the death of the adversary ensues from it.

Murder committed by any one who has been condemned to hard labour for life.

If any one against the will of a pregnant woman either endeavours to destroy her fœtus or to procure a mis-

Le nouveau Code Pénal qu'a sanctionné Sa Majesté le 16 Février dernier, entrant en vigueur déjà au commencement de l'année prochaine, je crois devoir y baser les renseignemens ci-dessous.

La peine de mort a certainement été maintenu dans le dit Code Pénal pour certains crimes, mais nulle part d'une manière absolue; c'est à dire, que là ou la loi prononce la peine de mort, celle de travaux forcés à perpétuité est établie à côté de celle là comme alternative, en sorte que le juge est autorisé à appliquer *soit* la peine de mort, soit la peine de travaux forcés à perpétuité, suivant les circonstances aggravantes ou atténuantes qui résultent des débats.

Il est à observer que c'est au *Tribunal* que revient le droit de prononcer la peine de mort, *le jury* n'existant en Suède que pour les délits de la presse. Quant à la portée que donneront les juges à l'application de la punition inférieure, il m'est impossible d'en exprimer une opinion, la loi même n'étant pas encore entrée en vigueur.

Voici les crimes pour lesquels, d'après cette loi, la peine de mort peut être prononcé:—

Le crime de haute trahison et quelques autres crimes attentatoires à la sûreté intérieure ou extérieure de l'Etat.

L'attentat consommé contre la personne du Roi.

Le meurtre de quelque autre membre de la Famille Royale.

Les voies de fait commises contre les personnes qui remplacent le Roi dans le Gouvernement de l'Etat, si le but en a été de troubler la liberté de leurs délibérations ou de leurs décisions, ou bien d'apporter entraves à leurs séances.

Le meurtre commis par celui qui excite la sédition sur la personne de celui qui veut l'apaiser.

L'assassinat, y compris l'empoisonnement, s'il a en pour résultat la mort d'une personne, ainsi que la fraude commise lors d'un duel, si la mort de l'adversaire s'en est suivie.

Le meurtre commis par celui qui a été condamné à travaux forcés à perpétuité.

Si quelqu'un contre la volonté d'une femme enceinte a tâché de tuer son fœtus ou de procurer son avortement,

carriage from which the death of the woman has resulted.

If any one has forcibly thrust another into a place where life was placed in evident peril, and where the death of the person so exposed has resulted.

Rape, by which the death of the woman is caused.

Perjury or false witness, if by it any person has been condemned to and has suffered death.

Wilful incendiarism, if death is caused by it.

Where any one has wilfully sunk a vessel with people on board, and has thereby committed homicide.

Where any one has wilfully destroyed a canal, or railway, &c., which might be followed by the death of any person, always provided that the perpetrator understood that there was cause for apprehending such a result.

Robbery with violence, or piracy, if the violence has been so great as to cause the death of any one.

If a judge has condemned to death any one he knows to be innocent, and if the sentence has been carried into effect.

The punishment of death is executed publicly by means of decapitation.

If the alternative extenuating punishment above referred to, *i.e.*, hard labour for life (which is the next most severe punishment to that of death), has been decreed for a crime which might have entailed decapitation, the condemned will undergo this punishment during the whole of the term, unless the Royal clemency interposes.

If the King pardons the criminal, it is for the latter to accept such clemency, or thoroughly to undergo the punishment pronounced by the Court. If he immediately accepts the Royal clemency, and commences to undergo the mitigated punishment by which he is permitted to expiate his crime, nothing hinders him from afterwards imploring the Royal clemency.

The ultimate diminution of the punishment, and even its entire suppression, frequently takes place where the criminal has rendered himself worthy of it, in having shown during the whole period of his

et qu'il en résulte a mort de la femme.

Si l'on a exposé quelqu'un avec violence en un lieu où sa vie était mise en péril évident, et que la mort de la personne exposée s'en est suivie.

Le viol, d'où résulte la mort de la femme.

Le parjure ou la fausse dénomination, s'il en résulte qu'un autre a été condamné à la mort et qu'il a subi la peine.

Le feu mis volontairement, si la mort d'une personne a été la suite de l'incendie.

Si l'on a volontairement coulé bas un bâtiment où il y avait du monde, et qu'il ait par là commis un homicide.

Si l'on a volontairement détruit un canal ou un chemin de fer, &c., et qu'il soit résulté du fait la mort d'une personne; à condition toutefois que l'auteur lui-même a compris qu'il y avait lieu de redouter un pareil malheur.

Le vol commis à l'aide de violence, ou la piraterie, si la violence a été si forte qu'elle a donné la mort à une personne.

Si un juge a condamné à la mort celui qu'il savait être innocent, et que la peine ait été exécutée.

La peine de mort s'exécute publiquement par voie de la décapitation.

Si l'alternative atténuante ci-dessus indiquée, c'est à dire, les travaux forcés à perpétuité, ce qui est, après la peine de mort, le châtiment le plus rigoureux, a été statuée pour un crime qui aurait pû entraîner la décapitation, la personne condamnée subira cette peine dans toute son étendue, à moins que la clémence Royale ne s'interpose.

Si le Roi fait grâce au criminel, c'est à celui-ci de l'accepter ou bien essuyer le châtiment prononcé par le Tribunal. S'il accepte ensuite la grâce Royale, et commence à subir la punition atténuée par laquelle il lui est permis d'expier son crime, rien ne l'empêche d'implorer ultérieurement la clémence Royale.

Ce qui a entraîné très-souvent la réduction ultérieure ou bien la suppression complète de la peine, si tant est que le criminel s'en est rendu digne, en ayant prouvé pendant toute la durée de la détention, des

detention a tendency towards moral improvement, or where some other extenuating circumstances have presented themselves.

The Royal Decree of 1861 concerning assassination, murder, and every other violence (the provisions of which decree are contained in the new Penal Code), abolishes the punishment of death for certain crimes (for example, most kinds of murder, as well as infanticide,) for which decapitation was formerly decreed; but considering the short time this decree has been in force, it is impossible to form a just idea of the influence produced on the number of crimes by the diminution of punishment under this decree. It should be remarked, however, that this mitigation, in fact, existed already before 1861, considering the extension given by the King in preceding years to his right of pardon—an extension rendered necessary by the shortcomings of the ancient penal legislation.

There is also this circumstance, namely, the difference between the old penal law and the modern ideas of jurisprudence which must not be lost sight of in forming an opinion upon the following Table.

(Signed) LOUIS DE GEER.

TABLE showing the Proportion between the Number of Persons condemned to Death by the Court of Première Instance and that of Persons executed during the period 1857–62.

Year.	Sentenced to Death.			Executed.			Per-centage of executed on Sentenced to Death.		
	Males.	Females.	Total.	Males.	Females.	Total.	Males.	Females.	Total.
1857	46	35	81	7	–	7	15·22	—	8·64
1858	46	35	81	12	2	14	26·09	5·71	17·28
1859	50	36	86	6	–	6	12·00	—	6·98
1860	34	37	71	1	1	2	2·94	2·70	2·82
1861	21	16	37	1	3	4	4·76	18·75	10.81
1862	14	2	16	2	2	4	14·29	100·00	25·00
Total -	211	161	372	29	8	37			
Average No. per Annum }	35	27	62	5	1	6	13·74	4·97	9·95

tendances d'amélioration morale, ou bien que d'autres circonstances atténuantes se soient présentées.

Quant à la question présentée au 4me point de la note sus-mentionnée, je m'empresse de communiquer que l'Ordonnance Royale de 1861 concernant l'assassinat, le meurtre, et toute autre voie de fait, ordonnance dont les stipulations sont contenues dans le noveau Code Pénal, abolit la peine de mort pour certains crimes (par exemple, la plupart des espèces de meurtre, ainsi que l'infanticide,) pour lesquels la décapitation était stipulée autrefois. Mais vu le peu de temps qu'a été en vigueur cette ordonnance, on ne saurait se faire encore une juste idée de l'influence exercée sur le nombre des crimes par l'atténuation de peine de la dite ordonnance. Je dois néanmoins faire observer à votre Excellence que cette mitigation existait *de facto* déjà avant 1861, vû l'extension qu'a donné le Roi dans les années précédentes à son droit de faire grâce—extension nécessitée pour les défauts de l'ancienne législation pénal.

C'est aussi cette circonstance, à savoir, la disharmonie entre l'ancienne loi pénal et les idées de jurisprudence des temps modernes, qu'il ne faut point perdre de vue en portant un jugement sur le Tableau ci-dessous requis par le 6me point de la note Anglaise.

(Signé) LOUIS DE GEER.

TABLEAU indiquant la Proportion entre le Nombre des Personnes condamnées à la peine de Mort par le Tribunal de Première Instance et celui des Personnes décapitées pendant la période 1857–62.

L'Année.	Personnes condamnées à mort.			Personnes décapitées.			t Sur le Nombre des Personnes condamnées à mort, celui des Personnes décapitées forme le °/₀ suivant.		
	Hommes.	Femmes.	Total.	Hommes.	Femmes.	Total.	Hommes.	Femmes.	Total.
1857	46	35	81	7	–	7	15·22	—	8·64
1858	46	35	81	12	2	14	26·09	5·71	17·28
1859	50	36	86	6	–	6	12·00	—	6·98
1860	34	37	71	1	1	2	2·94	2·70	2·82
1861	21	16	37	1	3	4	4·76	18·75	10·81
1862	14	2	16	2	2	4	14·29	100·00	25·00
Total -	211	161	372	29	8	37			
Nombre moyen par an }	35	27	62	5	1	6	13·74	4·97	9·95

NASSAU.

In answer to the request of Lord Russell, of which your Excellency has informed me by letter of the 24th Dec. 1864, I have the honour to inform you, that exclusively of military law and the case where martial law has been proclaimed in any part of the territory of Nassau, our Penal Code does not recognize death as a legal punishment. Therefore there is no occasion to enter upon explanations of the various points mentioned in the despatch of Lord Russell. Only, on referring to the third question, I beg leave to remark, that the punishment, which under our law is substituted for that of death, is condemnation to hard labour for life.

Believe me, &c.
PR. DE WITTGENSTEIN.

ANHALT.

In reply to the letter of the 24th Dec., which Her Britannic Majesty's Ambassador has been pleased to address to me on the subject of the execution of the punishment of death, I have the honour to inform him that Capital Punishment has been altogether abolished since the year 1850 in the Duchy of Anhalt, by the adoption of the Penal Code of Thuringia; and that in place thereof those convicted of what were formerly capital crimes are condemned to hard labour for life, now the most severe punishment under the law of Anhalt.

Trusting the information I have the honour to give, will be satisfactory to Her Britannic Majesty's Ambassador, I enclose herewith a copy of the penal code of the Duchy of Anhalt and the supplementary law.

I have the honour, &c.
26th Dec. 1864. (Signed) R. SINTENIS.

OLDENBURG.

My Lord, Hanover, 13th January, 1865.

With reference to my Despatch, No. 321, of the 24th ult., I have the honour to transmit herewith a copy and a translation of a note, dated the 6th inst., which I have received from M. de Rössing, the Minister for Foreign Affairs of Oldenburg, containing the information desired by your Lordship respecting the law of that Grand Duchy with regard to offences punishable with death, in the form of answers to the questions put by your Lordship in your Circular Despatch of the 24th of August last.

Your Lordship will perceive that Capital Punishment has been abolished generally in the Grand Duchy of Oldenburg since the year 1849, and is only retained exceptionally in the cases prescribed by military or martial law, or admitted by maritime law.

I have, &c.
The Earl Russell, K.G. (Signed) HENRY F. HOWARD.

Translation.

To the esteemed note of his Excellency Sir Henry Howard, Her Britannic Majesty's Minister Plenipotentiary, of the 23rd ultimo, concerning the provisions in force for the Grand Duchy of Oldenburg relative to the punishment of death, the undersigned has to reply the following:—

1. By the so-called German fundamental rights the punishment of death was abolished in the year 1849 for the extent of the Grand Duchy, and this abolition has been upheld in the Fundamental Law of the State of 1849, and in the Revised Fundamental Law of the State of 1852. In Article 43 of the last-named law the following provision on this subject is made:—"The punishment "of death is abolished excepting when military law (Kriegs Recht) or martial "law (Stand Recht) prescribes it, or maritime law in the case of mutinies "admits it. The repealed punishment of death is replaced, until the issue of "other penal enactments, by the next milder legal punishment."

A few years ago a new Penal Code was issued for the Grand Duchy, which in essential points harmonizes with the penal enactments in force in the Prussian monarchy. Nevertheless, all the crimes which are punishable with death by the Prussian Legislation are, according to the Legislation of the Grand Duchy, only punishable with the house of correction for life (Zuchthaus Strafe).

2. When the punishment of death still existed, the Courts of Justice of the Grand Duchy were not authorized, in the cases in which the law positively prescribed the sentence of the punishment of death, to pass a sentence for a milder punishment. The Court of Justice passing the sentence was nevertheless bound in every case, before the execution of the sentence of death, to submit all the documents to the Grand Duke, and the sentence could only be carried into execution after the Grand Duke had declared that the person condemned should not be pardoned.

3. The most severe punishment, according to the Legislation of the Grand Duchy, is the punishment of the house of correction (Zuchthaus Strafe) for life.

4. The abolition of the punishment of death has *not*, according to the experience hitherto made, led to an increase of the crimes deserving to be punished with death.

5. The execution of the punishment of death, in the cases in which military law or martial law prescribes it, takes place by shooting. Whether this shooting is to take place publicly or secretly is not prescribed by the law, and the decision upon this point is thereby left to the functionary to whom belongs in every particular case the execution of the sentences of death in virtue of military or of martial law.

Such sentences of death have not hitherto occurred.

6. During the period from 1829 until the abolition of the punishment of death, legal sentences of death were only passed twice, and in neither of these cases did the condemned person receive a pardon, nor was his sentence commuted into the punishment of an imprisonment.

The undersigned avails himself with pleasure of this opportunity, &c., &c., &c.

Oldenburg, January 6, 1865. (Signed) Von Rössing.

BRUNSWICK.

1. The Criminal Code, which came into force on the 1st of October 1840 in this country, and which is still valid, only threatens with the punishment of death the crimes—

1st. Of High Treason.
2nd. Of accomplished Murder.

2. In case of the coincidence of many and important grounds specified in the law for the reduction or diminution of the penalty, the lesser kind of punishment immediately following that of the punishment of death *may*, as regards capital crimes, be awarded, excepting in some particular cases of high treason and murder. It is not the jury, but the three learned judges acting in such cases who decide whether the grounds of such a mitigation exist. Of that authority no use has been made by the courts of justice in the sentences of condemnation which have been passed since 1840 on account of capital crimes, and of which the number is very small.

3. The most severe punishment immediately following that of the punishment of death is the punishment of confinement in irons (*Ketten-Strafe*) either for life or for a period of from 5 to 25 years. There does not exist any legal rule or usus as to whether the lesser punishment which, in virtue of a sentence or of an act of grace, replaces the threatened punishment of death is to be carried out to its full extent, or in what proportion it can be eventually mitigated. The right of pardon can in *one* case be exercised several times, and there is no reason to assume that the illness, the moral improvement of the convict, &c., might not bring about and justify a further mitigation of the lesser punishment by means of an act of grace.

According to the law of the 4th of August 1864 the punishment of the *House of Correction* (*Zuchthaus-Strafe*), a part of which is to be spent in solitary confinement, is to be awarded instead of the punishment of confinement in irons (*Ketten-Strafe*), but this law has not yet come into force.

4. Such alterations have not taken place since the year 1840. Before the year 1840 the Penal Judicial Code of the Emperor Charles V. had been in force here since 1568, but the punishments of death threatened in this law for the majority of crimes had, however, long before 1840 been abolished by the practice of the courts of justice, and been only retained for the blackest crimes. From 1814 to 1840 four punishments of death were carried into execution in this country. Since the milder legislation of 1840 an increase of the rare crimes worthy of the punishment of death has not been perceptible. Quite as little has the abolition by the legislation of the year 1850 of the former principle of legal process, that the punishment of death could not be awarded on the ground of proof furnished by evidence * (*Anzeige Beweis*), had any perceptible influence upon the decrease or increase of capital crimes.

5. The punishment of death was formerly carried into execution publicly by decapitation with the sword. According to the legislation of the 16th August 1850, it is to take place with the axe in an enclosed space, and with a limited publicity.

6. From the year 1840 to 1850 one sentence of death was carried into execution. Since 1850 the punishment of death awarded has been reduced by a pardon to a lesser punishment in two cases, and carried into execution in one case. Hitherto in less serious cases of murder, or when the proofs of guilt have not been completely clear, the criminals condemned to death have been pardoned. The punishment of death has not been awarded here on account of high treason.

STUTTGART.

My Lord, Stuttgart, 25th February 1865.

A proposal for the abolition of Capital Punishment was brought before the Chamber of Deputies last week, after the excitement of pretty extensive agitation throughout the country in its favour, chiefly promoted by the so-called "prelistic religious party."

The Government decidedly opposed the proposition, but the result of the debate, which lasted some days, was that the proposal was accepted by the Chamber by the large majority of 56 to 27.

I am informed by the Minister of Justice, Baron Neurath, that there is notwithstanding no likelihood of the measure being carried into effect. The Upper Chamber, it is anticipated, will reject it, and the Government is strongly opposed to it, and have positive evidence that it is by no means approved of by the Maires de Communes and other local administrators of justice throughout the country.

I have, &c

The Earl Russell. (Signed) G. S. R. Gordon.

NEW YORK.

State of New York, Bureau of Statistics,

Sir, Albany, 30th Sept. 1864.

I have the honour to return herewith the letter of the Secretary of State, together with the note of Mr. J. H. Burnley, the Chargé d'Affaires of Great Britain, asking for information as to the existing laws of this State in regard to offences punishable with death.

In obedience to your Excellency's request, I submit the following answers to the questions indicated therein.

First Question. What crimes, if any, are punishable with death by the laws of the State of New York?

Answer. Treason against the people of this State, and murder in the first degree.

(Murder in the first degree is defined by the law in the following words: "Such killing, unless it be manslaughter, or excusable or justifiable homicide, "shall be murder in the first degree in the following cases:

---

* Of facts or persons, in the absence of a confession on the part of the accused.—*Note of the Translator.*

"1. When perpetrated from a premeditated design to effect the death of the "person killed or of any human being.

"2. When perpetrated by any act imminently dangerous to others, and "evincing a depraved mind regardless of human life, although without any "premeditated design to effect the death of any particular individual.

"3. When perpetrated in committing the crime of arson in the first degree.")

Second Question. When a person is found guilty of a capital offence, is there any power in the jury or the court to reduce the punishment below that of death by finding extenuating circumstances, and, if so, is the power frequently exercised?

Answer. There is no such power either in the jury or the court.

("The Governor shall have power to grant reprieves, commutations, and "pardons *after conviction* for all offences, except treason and cases of impeach-"ment."—Constitution.)

Third Question. (First part.)—What is the most severe punishment next to that of death by the laws of New York?

Answer. Imprisonment in a state prison for the term of the natural life of the convict at hard labour.

Third Question. (Second part.) In cases where the sentence of death is reduced by the finding of extenuating circumstances or commuted by the Government to such lesser punishment, is the latter invariably carried out in full? If not to what extent is it mitigated?

Answer. Where the sentence is reduced by commutation by the executive it is not invariably carried out, but is very rarely mitigated.

Fourth Question. (First part.) Have there been any changes of late years in the laws of New York by which certain crimes formerly capital have now ceased to be so?

Answer. Yes. For many years no essential changes had been made; but within five years the laws of this State in regard to capital punishment have twiced been changed. Prior to 1860, arson in the first degree, and murder in the second degree as now declared were capital offences, but they have now ceased to be so. In 1862 the present law was enacted. It made a division in the crime of murder (see answer to first Question and below), and reduced the punishment for arson in the first degree to imprisonment in a State prison for any term not less than 10 years.

(Arson in the first degree "consists in wilfully setting fire to or burning in "the night-time a dwelling-house in which there shall be at the time some "human being, and every house, prison, jail, or other edifice which shall have "been usually occupied by persons lodging therein at night shall be deemed "a dwelling-house of any person so lodging therein."

Murder in the second degree is defined as "the killing of any human being "when perpetrated without any design to effect death by a person engaged "in the commission of any felony" other than arson in the first degree.)

Fourth Question. (Second part.) If so (as in part first), have those crimes increased, and is their increase, if any, attributed to the diminution of the punishment?

Answer. Whether the limited experience under the present law, which has been in force only since April 1862, is of much value, is submitted to your Excellency?

Fifth Question. In what manner is the sentence of death executed, and does the execution take place in public or in private?

Answer. Sentence of death is executed by hanging by the neck. Executions only take place in private.

Sixth Question. In what proportion of capital convictions is the punishment of death usually reduced by the clemency of the State to such minor infliction?

Answer. But few convictions have taken place under the law of 1862, of these the sentences of a part have been suspended.

Respectfully,
(Signed) L. L. Doly.

OHIO.

The State of Ohio, Executive Department,
Columbus, 15th September 1864.

RESPONSE of the Governor of Ohio to the interrogatories of J. H. Burnley, Chargé d'Affaires of Great Britain, communicated by Honourable W. H. Seward, Secretary of State.

1st. The statutes of Ohio furnish the crimes of treason and murder in the first degree with death. The latter crime must be committed with "premedita-" tion and deliberation."

2nd. Where a person is convicted of murder there is no power in the jury or court to mitigate the punishment. The jury may find a verdict of murder in the second degree, the punishment of which is imprisonment in the Penitentiary at hard labour during life.

3rd. The next severe degree of punishment is that of murder in the second degree above referred to, where the conviction is for murder in the first degree, involving the punishment of death. The Governor has the power at his discretion, upon the presentation of mitigating circumstances, to commute that punishment to imprisonment for life in the Penitentiary. For all offences (except treason) the governor has the power in his discretion of unconditional pardon.

4th. There have been no changes since the organization of the State Government as to the offences punishable by death. Executions of late years have been rare, but I am unable to say whether the commission of that class of crimes has been affected favourably or unfavourably by the species of punishment.

5th. The sentence of death is executed by hanging, and is performed privately within the prison walls, a limited number of public officers and spectators being admitted as witnesses, at the discretion of the Sheriff of the county.

6th. I have not the data upon which to answer this interrogatory without an elaborate examination of the executive records. It is probably safe to say that one-half of the cases of conviction for capital offences during the last 10 years have been commuted to imprisonment for life. Under one classification of murders, it is only an extreme case that involves the death penalty, and convictions for this crime are quite rare. No conviction for treason has ever been had in the State.

Very respectfully,
(Signed) JNO. BROUGH,
Governor of Ohio.

On the LAWS of CAPITAL PUNISHMENT and the TREATMENT of CONDEMNED CRIMINALS in PENNSYLVANIA.

Philadelphia, Pennsylvania,
November 17, 1864.

SIR,

HIS Excellency Andrew G. Curtin, Governor of the Commonwealth of Pennsylvania, has received from you a written communication addressed to "the Governor of the State Prison, Harrisburgh, Pa.," dated September 9th 1864, in which you ask information as to the advantages or disadvantages of Capital Punishment inflicted publicly or privately, and also as to life terms or long terms of imprisonment, and if the silent system is not a failure.

The Governor of Pennsylvania is the chief magistrate of this State, and exercises those constitutional and legal functions which belong exclusively to the Executive Department of our State Government.

He has no other relation, official or otherwise, to State institutions, than to approve the laws establishing or regulating them. These institutions are governed by boards of management, direction, or inspection, and their annual reports are submitted to the Governor and Legislature, or either or both, as specially required.

The Penal Institutions of this State are known as State Penitentiaries, and known throughout the world to all educated men interested in questions of penal science or criminal jurisprudence, as devoted to the "separate confine-" ment of convicts," or the "separate system" penitentiaries. One is located

in Philadelphia (sometimes called Cherry Hill Penitentiary), the other in Pittsburgh, Pa. They are correctly designated as the State Penitentiaries for the eastern and western districts of Pennsylvania.

His Excellency the Governor, on the receipt of your letter, did me the honour to transmit it to me, stating, as I well knew, that his most pressing official engagements at this time would prevent his giving you a reply without a very long delay.

Having large experience in the subject matter of the inquiries you make, it gives me pleasure, at the instance of Governor Curtin, to offer you the following suggestions and opinions which 24 years' experience, gained by continuous official relation to the subject, sanctions and justifies.

Pennsylvania, both in its colonial and afterwards in its sovereign character as a government, adopted the laws of England as far as practically suited to the condition of its people. The common law is the normal jurisprudence of the State. New statutes were enacted and the old modified as necessity required. It may be succinctly stated that the laws of England are the basis of our system. Crimes against persons and property are the same in both countries; the punishment differing in some cases, but only as exceptional. Thus, on the 15th of September 1786, murder, robbery, burglary, rape, sodomy, malicious maiming, manslaughter by stabbing, witchcraft and conjuration, arson, concealment of death of bastard children, counterfeiting any gold or silver coin, and every felony (except larceny), on a second conviction were made capital offences or felonies, without benefit of clergy.

From time to time the penal code was ameliorated and modified, and its rigour softened. In the year 1825 enlightened efforts were made to change the crimes code and system of punishment in Pennsylvania. This was successfully accomplished in 1829. Now, murder in the first degree, or wilful, deliberate, premeditated killing is the only capital felony in Pennsylvania. There is no life term of imprisonment, except for a second conviction for murder in the second degree. The minimum term is, say, one year, and the maximum, say, 12 years, for all offences which were under the laws of England felonies of death.

The imprisonment is now under the "separate system," which confines the convict in a cell, in which he learns, labours, eats, and sleeps, with a yard for daily exercise in the open air; the fundamental idea being *separation of convicts from each other*, and reformation by individualizing the discipline and educational instrumentalities to the actual condition of each convict.

Association of convicts, or the congregate system, is the other mode generally in use.

The Pennsylvania plan was once called the solitary, and the congregate the silent plan of imprisonment. Neither of these descriptions was correct as descriptive of either. These terms were, in themselves, descriptive only of incidents of both systems. Association or non-association, separate or congregate, properly distinguish them.

The *silent plan* associated the convicts at work and in daily vocations, at church services, meals, &c., but by severe punishment prevented inter-communication by signs or language of words. The *solitary plan* confined each convict in an apartment or cell by himself, where he worked, ate, slept, wrote, learned his trade, and his mind was cultivated and his morals taught and trained. Solitary, as not associating with other convicts at any time for any purpose.

In Pennsylvania all the local or county gaols and both State penitentiaries are conducted on the separate system. New Jersey has a State penitentiary on this plan. All the other States which have not reformed their systems are on the congregate plan. Its cheapness, as it is called, is too powerful a motive against a reform, which suggests cost of money, for the real benefit of the convicts in a State.

This preface seems to be necessary, from the vague nature of your questions, and the want of correct and accurate information on so important a subject as the character of our system of convict treatment, which your letter manifests. To reply to them without this introduction would be very difficult; difficult to convey to your mind the essential requisites fully to appreciate the philosophy which underlies our experiment in penal science as an element in the great problem of social science.

Prior to the year 1834, murder in the first degree (as already stated) was the only capital felony. The punishment was hanging by the neck by public execution.

In the year 1834 capital punishment for murder, by hanging, was regulated by law. This law requires the sheriff of the county where the convict was tried, on the warrant of execution from the Governor of the State, to select 12 good citizens as a jury to witness the execution, who, being duly sworn or affirmed, do witness the execution in the enclosure or yard of the gaol where the prisoner was confined. No persons are present but the sheriff, his deputies, the jury, the officers of the prison, the medical staff, and the clergyman. After the prisoner is pronounced dead, the jury make a return, signed by them, as evidence of the execution of the judgment of death. This is the law in Pennsylvania. The Governor of the State is thus required only to issue his mandate for the execution of the judgment of death on the prisoner. He has the power, if he should think the public interests demand it, in his annual message to the Legislature on public affairs, to suggest any changes on this or any other subject. He never has done so, and this implies his approval of the present law and its public benefits.

The principle of non-association, the idea of separation of convicts during punishment, is thus carried to the infliction of the death penalty—private, free from the contaminating influences of a public show. The death penalty is now inflicted under the influences of that feeling of awe which ever attaches to the unseen operations of so dreadful a punishment.

It would require very carefully prepared statistics to show what amount and the nature of the crimes which public executions produce. This view of the subject is not embraced in your queries.

My experience induces me to believe that public executions of persons condemned to death are highly prejudicial: 1st, as incentives to crime-cause; 2nd, familiarity with this, the highest punishment of the law; 3rd, destroying the salutary effects which it is intended to produce; 4th, by exciting sympathy with the culprit; 5th, by destroying respect for the forms of judicial action; 6th, by making the guilty a hero rather than a victim; 7th, by making the infliction of this penalty a time of riotous and disorderly tumult rather than a solemn scene attending on the last moments in the life of the guilty; 8th, in giving encouragement to hypocritical demonstrations of religious faith; 9th, in the mockery of a pretended repentance; 10th, in giving credit to dying confessions, made under the influence of hysterical emotions; 11th, in creating a morbid anxiety for the culprit's life and history; and, 12th, in counteracting all the purposes for which the life of the culprit is thus taken in public. Add to these the grossness of feeling which executions of females induces, and then the almost insuperable difficulty of maintaining the integrity of justice in their cases. These suggestions relate to one view of the subject.

The increasing reluctance of citizens to serve as jurors in capital cases, where the trial is for murder, and the verdict may be guilty, is in this country a growing evil. It is very difficult to obtain a jury in capital cases. Every expedient is resorted to, which an excited and often an unreal conscientiousness can suggest, to enable the citizen called on to be excused on the ground that he is conscientious against finding a verdict of guilty when the punishment is death. This excuse is fatal to the acceptance of a juror. He is challenged by the State for cause and set aside. Hence juries, when sworn, seek every avenue through which a verdict can be drawn from the body of the evidence by compromise for a lesser degree of murder than the capital degree. We have murder in the first degree; murder in the second degree, which is punished by imprisonment for from four to twelve years; for a second offence imprisonment for life; and manslaughter, imprisonment for from two to six years. Thus it frequently happens that a prisoner, who is clearly guilty of murder in the first degree, is convicted of the second degree. I do not know of a single instance in this State of a second conviction for murder in the second degree, as laid in the indictment. The life punishment would induce the jury to lessen the degree of their verdict.

These may be said to have been the reasons among others which induced the Legislature of Pennsylvania to repeal the law requiring public executions, and reducing the number of crimes the punishment for which was death. The people are satisfied with the change, and the general opinion, and I freely

concur in it, is that both have been beneficial reforms in our system of criminal jurisprudence.

That public executions prevented the commission of crimes was never pretended to be a result produced by or from them. But, gentlemen, in any consideration of the subject, the social condition of the people must have a very controlling influence. Indeed it constitutes a very vital element in the subject itself. The social condition must be first fully examined and mastered before attempting to legislate upon crime cause or crime punishment. This gives to penal science, as an element of social science, a most prominent and important rank among our domestic relations in the largest signification. If you will permit me to refer you to a paper prepared by me, on request, and read before the National Association for the Promotion of Social Science, at its sixth annual meeting, held in London, June 1862, you will therein find some suggestions which may interest you in this view of the subject. I will not repeat any here, as the whole paper is accessible to you, no doubt.

The only question now which is to be spoken of is the failure of the silent system.

I fear you have misused the term. It was no doubt in your mind to refer to our Pennsylvania or the separate system. After 30 years in full experiment, we find it to be a success beyond all the anticipations of its founders. It lessens crimes, reforms the convict, and improves the individual. But, let me say, all this depends on the administration of the discipline of the system. Unless the administration is of the highest order, both as to the persons employed, their character, adaptation to their duties, interest in the plan, anxiety to perfect it, watchful care by both medical and other officers, supervision of the most calm and liberal kind, it may be a failure. It would be a failure if any other than the highest motives for action and effort were permitted to oversee its operation. It demands liberal views, constant study of individual character and habits, mental, moral, and physical, of the convict, and a wise economy and uninterrupted administration. With us in Pennsylvania it has been most favourably administered, because our people determined it should be made successful if it was within the power of the Legislative and Executive Departments of our Government. The result has given entire satisfaction to all thinkers, observers, and students of penitentiary punishment, reformatory and punitive in its object.

But though the system is separate, yet I do not wish to be understood as claiming that a man of weak mind, poor constitutional physical condition, of a low order of moral character, long a victim to the worst passions of his nature, which too often constitute the class of convicts received into our penitentiary, would improve in all these impaired conditions by merely separating him from other convicts. The treatment of each convict must be individualized to his *sui generis* character, as best developed and best treated by his individual position,—isolated, separated position,—in a penitentiary. This is the spirit of our system. This gives it its real success. This is the merit of its administration. Without this the system would not be so successful as it is with us.

As we never had in the eastern penitentiary at Philadelphia a convict sentenced for life, I cannot speak from experience of its effects on life-term sentences; but we have had convicts for 12 and 16 years, and their health and morals have been far better on their discharge than on their conviction.

If a convict sentenced for life were sent to our penitentiary, and had no expectation or possibility of a pardon, he would be separated from all other convicts; but his treatment would be such as his moral, mental, and physical constitution, habits, education, &c., seemed to demand as best suited to his welfare. But unless the case was one of intense enormity, any Governor of this State would be humane and enlightened and bold enough, if a case were made out, to pardon him after a sufficient term of imprisonment had shown him reformed, and ready and able to lead a virtuous life.

Here again comes into view a social question which must be fully understood in considering this subject. The power of pardon is with us a most wise, beneficent, humane, and salutary power, vested as it is in the Governor of Pennsylvania. It should be used when required; and no conditions should limit the free exercise of the sound judgment of the executive. The public has not yet suffered injury from its use thus far, and I know many men who would

have been made good citizens if they had been pardoned before their terms expired.

The pardon often accomplishes what imprisonment fails to do in the moral character of a convict. He feels he is restored, re-established in the good opinion of the public by the pardon under the great seal of the State.

These suggestions are made in reply to your note, and after submitting them to Governor Currin, with his permission I will send them to you, with a report of our penitentiary.

If you wish further information, within my power to give, I will most cheerfully send it to you; or any paper or other matter you may desire.

I am, &c.

RICHARD VAUX.

To William Tallack, Esq.,
Secretary of the Society for the
Abolition of Capital Punishments,
No. 36, Southampton Street, Strand, W.C.,
London.

MASSACHUSETTS.

LETTER from CHIEF JUSTICE BIGELOW (MASSACHUSETTS) to RICHARD H. DANA, Esq.

Constitution Hill, Quincy,
September 12, 1864.

DEAR SIR,

I RECEIVED your favour of the 5th instant a day or two since. I should be glad, if I could, to give extended answers to the inquiries of Sir John T. Coleridge on the subject of capital punishment; but at this moment I am preparing to go on the western circuit, and am greatly occupied with matters which cannot be postponed. I must content myself, therefore, with giving very brief answers on the points suggested in your note.

I. Juries in Massachusetts do not hesitate to convict persons charged with capital crimes on sufficient evidence. During my experience on the bench for the last 14 years, I have not known a case in which the Government have failed to obtain a conviction when the court thought the evidence would well support the verdict. We have had some cases, too, which were calculated to put jurors to a pretty severe test. For example, a case of wife murder, in which the evidence showed that the wife was fatally ill of *pneumonitis* at the time the alleged homicidal act was committed, and would in all probability have died of the disease in 24 hours if the husband had not committed violence on her person. The jury were told by the court that if they were satisfied the act of the prisoner was the immediate and efficient cause of death, and hastened that event only a few hours, the prisoner ought to be convicted. The verdict was, Guilty.

II. The number of persons excused from service as jurors on the ground of conscientious scruples on the subject of capital punishment does not, of late years, average more than one in 20. Formerly the proportion was much greater, say, one in eight. It has been a subject of remark by the bench that of late fewer persons set up the excuse than formerly. This is especially true since our civil war begun. Perhaps it may be well to add, that our statute requires the court, as each juror is called, to cause him to be sworn on his *voir dire*, and to interrogate him concerning his opinions on the subject of capital punishment. If he answers that he has conscientious scruples, he is peremptorily set aside.

III. I have no experience from which I can speak on the subject of the difference between the moral effect of private executions as compared with those which take place in public. Our statute requiring them to be private has been in force since the year 1836. My impression is very strong in favour of our mode of inflicting the punishment. It certainly has the obvious advantage of avoiding the evils which flow from collecting together a large crowd of persons of both sexes to witness such a spectacle. At the same time the moral effect is not lost; because the great fact that life has been forfeited as a penalty for crime is known throughout the community, and the details of the execution, which are always conducted with great solemnity, are fully made public through the press. Everybody reads newspapers here, as you know.

IV. In the year 1852 the crimes of rape, arson, &c. were taken out of the list of capital offences and made punishable by imprisonment for life, leaving murder the only crime punishable with death in our penal code. Since this change in the law, I do not think that the crimes which ceased to be capital have increased. In the year 1858 the statute creating degrees in the crime of murder was passed. It is as follows :—

Sect. 1. "Murder committed with deliberately premeditated malice afore-
" thought, or in the commission of, or attempt to commit, any crime punishable
" with death or imprisonment for life, or committed with extreme atrocity and
" cruelty, is murder in the first degree."

Sect. 2. "Murder not appearing to be in the first degree is murder in the
" second degree."

Sect. 3. "The degree of murder shall be found by the jury."

Sect. 4. "Whoever is guilty of murder in the first degree shall suffer the
" punishment of death."

Sect. 5. "Whoever is guilty of murder in the second degree shall be
" punished by imprisonment in the State prison for life."

Sect. 6. "Nothing herein contained shall be construed to require any
" modification in the existing forms of indictment."

The phraseology of the first clause of the first section is certainly not to be commended. It has been interpreted judicially to mean any murder where an intent to take life is found to exist, however brief it may have been before the commission of the act. Practically it puts all acts of homicide, which at common law would have been deemed to have been committed with implied malice, into the second class.

We have found no difficulty in the administration of this law. Juries readily appreciate the distinction which the statute is designed to establish, and apply it with facility to facts proved. I cannot say that the effect of the statute has been either to increase or diminish the crime of homicide in either class.

V. As to the inquiry concerning infanticide by the mother, I can give no information, because we have no experience on the subject. I have never known an indictment to be returned in this State for the offence. The crime is a very rare one in the New England States. I attribute this mainly to the fact that, owing to the facility with which our labouring classes can acquire the necessaries and comforts of life, marriage is almost universal among them. There is, therefore, less temptation to illicit intercourse, and no difficulty is experienced in giving support to large families of children.

I am sorry that I have no time to add anything further on the points of inquiry suggested in your note. If you think these hasty memoranda will be of any service to Sir John Coleridge, you can, if you please, forward them to him.

With sincere respect and regard,

I am, &c.
G. T. Bigelow.

Richard H. Dana, jun., Esq., &c. &c.
Boston.

Letter of Richard H. Dana, jun., Esq., Law Officer of the United States within the State of Massachusetts, to Sir John Coleridge.

My dear Sir John, Boston, October 17, 1864.

I addressed letters to the Chief Justice and Attorney General of Massachusetts, the two persons I thought best qualified to give you the information you desire, and I have the honour to enclose to you their replies. Chief Justice Bigelow has been 14 years on the bench, and has had a wider experience in capital trials than any man in the State. Mr. Foster, the Attorney General, has been in office four years, and is charged, by our system, with the oversight of the subjects of your inquiry. I hope you will find their answers useful to you.

My own experience is small in the direction of your inquiries. I have, however, been an observer of the working of our system, and concur entirely in the statements of the Chief Justice and Attorney General. I think you may

treat certain points as settled in the jurisprudence and judicial experience of Massachusetts.

I. There is no difficulty in obtaining verdicts of guilty in capital cases where the court think them proper.

II. Thirty years ago there was so prevalent an opinion against the lawfulness of taking life in the way of punishment, that a statute was passed requiring the court to interrogate each juror in capital cases whether he had conscientious scruples as to taking life by way of punishment, and, if he had, to set him aside in justice to the Government as well as in tenderness to him. For many years numbers were excused on that ground. About 15 years ago a change was noticed, and the number of exempts has steadily diminished. Now exemption by reason of that scruple is of rare occurrence. It is not, in my judgment, at all attributable to our civil war. It was noticed by the court 15 years ago; and, before our war began, it was a rare thing to hear a juror admit such a scruple.

III. The opinion is settled in favour of private executions. We should look with horror upon a public execution, unless in some sparse rural district, out of reach of crowds. Our laws require certain officers to be present, with physicians sworn for the purpose.

IV. Division of murder into degrees is approved. The best opinion would include the killing of officers in discharge of duty in the first degree.

V. Infanticide is almost an unknown crime in New England. I think the Chief Justice has given the true reason for it.

I enclose also a copy of the Attorney General's replies to questions sent from the State Department.

Believe me faithfully yours,

R. H. DANA, jun.

LETTER from DWIGHT FOSTER, Esq., Attorney-General of the State of Massachusetts, to R. H. DANA, Esq., U.S. Dist. Attorney.

Attorney General's Office,
Boston, September 24, 1864.

DEAR SIR,

IN reply to your inquiry in regard to capital punishment in Massachusetts, I can give you very briefly the result of my four years experience.

1. I have had no difficulty in obtaining verdicts of guilty in the first degree. No verdict in the second degree has been returned when I have asked for a capital conviction; but I have been very careful not to press for such conviction when it seemed to me that the circumstances of the crime did not require the execution of the defendant, even though it might technically fall within the definition of murder in the first degree. In all milder cases, of which there have been 10 or 12 during my term of office, I have consented to a plea of guilty in the second degree, and the defendants have uniformly so pleaded without trial.

I have had seven verdicts of guilty in the first degree; three disagreements, two in one case where a woman was tried for poisoning, and one in the case of a boy of very feeble intellect who was claimed to be *non compos sceleris*, but who seemed to me to have intelligence enough to render him a fit subject of punishment, and who afterwards pleaded in the second degree; one case I abandoned at the close of the Government's evidence; and one defendant was acquitted of a homicide connected with a Boston riot, whom I should not have tried had not the peculiar circumstances connected with the affair rendered it important to have the facts publicly investigated.

2. There has been a great change in the feelings of the community in regard to capital punishment. The public sensibility on this subject has much diminished, and comparatively few jurors now ask to be excused on the ground of conscientious scruples against the death penalty. The question is put to every juryman, and I have not heard more than five or six claim exemption.

3. Public executions were abandoned in this State many years ago, and I believe the change has been universally regarded as beneficial.

4. I regard the division of the crime of murder into two degrees as a decided improvement. The American cases on this subject are conveniently collected in Wharton's American Law of Homicide.

Murder in the first degree includes—

(*a.*) Murder committed with deliberately premeditated malice aforethought. These adjectives are not interpreted by the Court to have as much force as, on first reading, seems to belong to them. To deliberate is to exercise the will; to premeditate is to determine beforehand; no particular time is required for these mental acts, and the distinction between express and implied malice marks the difference between murder in the first and second degree.

(*b.*) Murder committed with extreme atrocity and cruelty.

(*c.*) Murder committed in the commission of, or in the attempt to commit, a crime punishable by death or imprisonment for life.

In addition, I think the first degree should also include murders committed upon sheriffs, police officers, and constables in the discharge of their official duties. With this change I should be satisfied with Massachusetts legislation on the subject.

I can refer you to no documents except the various review articles on capital punishment, a list of which may be found in Poole's Index to Periodical Literature.

DWIGHT FOSTER.

R. H. Dana, jun., Esq.,
U. S. Dist. Attorney.

1st. Murder in the first degree is the only crime punishable with death by the law of Massachusetts. It is defined by statute as follows:—"Murder "committed with deliberately premeditated malice aforethought, or in the "commission of, or attempt to commit, any crime punishable with death or "imprisonment for life, or committed with extreme atrocity or cruelty, is "murder in the first degree," and the judicial construction of murder committed with deliberately premeditated malice aforethought nearly corresponds with the common law distinction between murder with express and with implied malice.

The first degree includes all cases where the intention to take life existed before the act was committed, however short a space of time intervened between the conception and the execution of the design.

2d. No power to reduce the punishment exists, either in the jury or the court, where a verdict of guilty in the first degree has been rendered.

3d. Next to death, the severest punishment is imprisonment for life in the State prison at hard labour, with a few days of solitary imprisonment at the beginning of the time.

By the constitution of Massuchusetts the whole power of pardon and commutation resides in the Governor, with the advice of the Executive Council. After a commutation of the sentence of death to imprisonment for life, further mitigation is rarely granted.

4th. Until the year 1852, treason, rape, carnal knowledge of a female child under 10 years of age, and arson of a dwelling-house in the night-time were punishable by death; they are now punishable by imprisonment for life, at hard labour, in the State prison.

In 1858 the statute dividing murder into the first and second degree was enacted; at earlier periods other crimes were capitally punished, but the charges stated above are the only ones within a number of years.

5th. Our statute provides that "the punishment of death shall in every "case be inflicted by hanging the convict by the neck until he is dead, and the "sentence shall, at the time directed by the warrants, be executed within the "walls of a prison of the county in which the conviction was had, or within "the enclosed yard of the prison."

Public execution ceased in 1836.

6th. Upon application to the Secretary of the Commonwealth I learn that since 1852, there have been 17 persons sentenced to death for murder, of whom five have been executed, and the residue have been committed to imprisonment for life.

This great proportion of commutations was probably owing somewhat to a state of public opinion adverse to capital punishment, which has, since the commencement of the present war, considerably changed.

I have, &c.

DWIGHT FOSTER,
Attorney General.

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LETTER from H. BINNEY, Esq., to the Right Hon. Sir JOHN COLERIDGE.

MY DEAR SIR, Philadelphia, September 6, 1864.

IF I could place under your eye (for you could hardly hold them with your hands) a Treatise on American Criminal Law by Francis Wharton in two large volumes of more than 3,000 sections, of which the fifth edition was published in this city in 1861, you would find nearly everything on the subject of capital punishment to which your late letter referred, and upon which my letter of 25th August promised to write further. My son is still absent with his family in the country, but I believe I can supply, in a general way, what you seek to know.

The United States and the respective States have different systems of penal law.

The General Crimes Act of the former was passed on the 30th April 1790, before the reformation of penal law was commenced in Pennsylvania by the Act of 1794, and though the different States have successively followed the lead of this State in restricting capital punishment almost, if not quite altogether, to that offence which we and most of them call murder of the first degree, as I defined it from the Pennsylvania Act in my last letter, the United States have not deviated materially from the line first taken.

The United States have no penitentiary system nor penitentiaries to enforce it, nor, perhaps, gaols of any kind. They depend upon the friendly accommodation of the States for places of imprisonment and hard labour, though under the custody of their own marshals.

Under the Act of 1790 the United States punished capitally murder on the high seas, or any arm of the sea, bay, river, &c., under their Admiralty jurisdiction and out of the jurisdiction of any particular State; so also they punished, in like manner, robbery on the high seas or any other offence on the same, which, if committed within the body of a county would by the laws of the United States be punishable with death. They at the same time made capital a class of marine offences; running away with a vessel or merchandise on board to a certain value, or yielding her voluntarily to a pirate; a seaman laying violent hands upon his commander, to prevent his fighting in defence of his ship or goods, or making a revolt in the ship.

By a subsequent Act of Congress in 1825, they punished with death the wilful and malicious burning of a dwelling-house, store, barn, stable, or any other building, parcel of a dwelling, or mansion-house, within any port, dock-yard, &c., the site of which was ceded to the jurisdiction of the United States. The burning of arsenals, armouries, magazines, &c., not parcel of a dwelling-house, was by the same made punishable by fine, imprisonment, and hard labour.

By the same Act of 30th April 1790, forgery of certain descriptions was punished with death; that is to say, public securities of the United States. Forgery of other writings generally, by fine and imprisonment and hard labour. Stealing, altering, &c., records, writs, &c., by fine and stripes, not exceeding 39, which was altered by an Act in 1842 to fine and imprisonment.

Rape on the high seas, &c., is punished with death by an Act of Congress of 3rd March 1825. Treason was, of course, punished with death by the Act of 1790.

In fine, the penal law of the United States, which have a special jurisdiction only, is pretty much unaffected by modern reform. The punishment by stripes had to be executed within the walls for very shame to my knowledge up to the Act 1842.

But in regard to the States generally, I think I may say that murder of the first degree is alone punishable with death; and in one state, Alabama, the jury by whom the criminal is convicted have a discretion to elect for him imprisonment and hard labour for life in lieu of death. Virginia still punishes arson of a dwelling-house in the night time by a free person with death, unless the jury find that no person was at the time dwelling in the house. How slavery qualifies either crime or punishment in the slave states, I do not know, nor probably is it material to you to be informed. Treason against the state is, I believe, punishable by death in the state of New York, as is also what they call arson of the first degree. The penal law of that State is very refined, not to say artificial, in its discrimination of certain crimes. It has four degrees

of manslaughter and four degrees of arson. You do not care probably to know any thing about these.

In the Northern and Western States, for the most part at least, the penitentiary system, pretty much on the plan of Pennsylvania with modifications, nevertheless, is in full exercise. In general, I am informed it works well. In this State it has universal acquiescence and general approbation. As a people, we have come to the sentiment that corporal punishment is pernicious to the state, and that capital punishment should be confined to the highest crime against the people. Treason, and to wilful and malicious murder, as defined in the Pennsylvania Act, and in the acts of the other States; and with this limitation my own experience induces me to be satisfied, and nothing would at present induce me to acquiesce in the abolition of capital punishment in the case of murder. As to treason, I do not feel so confident.

Perhaps my dear sir, you may think it necessary in the progress of the Commission to point your inquiries specially in regard to certain heads of information. If I shall be living and unable myself to give the requisite answers, I can at least put them in the proper channels for answers, and it will give me pleasure to do it.

I am, &c.,

The Right Hon. Sir J. Coleridge. H. Binney.

STATES OF MAINE AND RHODE ISLAND.

My Lord, Washington, January 20, 1865.

With reference to your Lordship's Despatch, No. 560, of the 15th December last, instructing me to procure, for the information of the Capital Punishment Commissioners, copies of laws enacted for the punishment of crime in the States of Michigan, Rhode Island, and Wisconsin, I have the honour to enclose copy of a note which I addressed to Mr. Seward, asking for the information required, and copy of Mr. Seward's reply, transmitting a volume from the Governor of Rhode Island, as well as a copy of a letter and enclosure from the Governor of Maine, relative to the punishment of crime in those States.

I have, &c.

The Earl Russell. (Signed) J. Hume Burnley.

Sir, Washington, December 31, 1865.

With reference to my note of the 9th September, and to your replies of the 5th and 25th October, inclosing copies of the replies of the Governors of Ohio, Massachusetts, and New York, respecting the laws of those States with regard to Capital Punishment, I am instructed by Her Majesty's Principal Secretary of State for Foreign Affairs to state, that the Capital Punishment Commissioners are especially anxious to procure full information on this subject from the States of Michigan, Rhode Island, and Wisconsin, as well as from any of the other States of the Union where such information can be easily obtained.

I have the honour, therefore, to request you to be good enough to procure for me the information desired.

I have, &c.

The Hon. W. H. Seward. (Signed) J. H. Burnley.

Sir, Department of State, Washington, January 19, 1865.

Referring to your note of the 31st ultimo, requesting at the instance of Earl Russell to be furnished with such information as may be easily obtained in regard to the legislation in the several States upon the subject of Capital Punishment, I have the honour to transmit to you a volume* from the Governor of Rhode Island, which contains the laws enacted for the punishment of crimes in that State, and to enclose a copy of a letter of the 13th instant, with

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* Capital Punishment no longer exists in Rhode Island. Murder is punished by imprisonment for life.

its accompaniments from the Governor of Maine, relating to the laws in that State concerning the crimes punishable by death.

I have, &c.

J. H. Burnley, Esq. (Signed) W. H. Seward.

State of Maine.

Sir, Executive Department, Augusta, January 13, 1865.

In reply to your communication of the 15th instant, I have the honour to forward abstracts of all existing laws of this State in relation to Capital Punishments.

Subsequent to the passage of the laws in A.D. 1837, requiring the postponement of execution till after the lapse of a year, no execution has taken place in this State till the last summer, although there is quite a large number of capital felons in the State prison. An impression unwarranted by the law has prevailed, growing out of executive non-action, that Capital Punishments were virtually abolished in this State. The number of capital crimes in the interval largely increased.

Whether any argument is to be deduced from this state of facts in favour of capital punishments, others can judge as well as myself.

Should any further information be desired in my power to afford, it will be done with pleasure.

I have, &c.

Hon. W. H. Seward. (Signed) Samuel Cony,
Governor of Maine.

Revised Statutes of Maine.

"Title Eleven."

Chapter 117 (Extract).

"Offences against the Sovereignty of the State."

"*Section* 1.—Treason consists in levying war against the State, adhering to its enemies, and giving them aid and comfort. No person can be convicted of it without the testimony of two witnesses to the same overt act or confession in open court. Its punishment is death."

Chapter 118 (Extract).

"*Section* 1.—Murder is the unlawful killing of a human being with malice aforethought, either express or implied."

"*Section* 2.—When murder is committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable by death, imprisonment for life, or for an unlimited term of years, it shall be deemed murder of the first degree, and punishable with death."

"*Section* 3.—When murder is committed otherwise than is set forth in the preceding section it shall be deemed murder of the second degree, and punished by imprisonment for life."

"*Section* 4.—The jury, finding a person guilty of murder, shall find whether he is guilty of murder in the first or second degree. When a person is found guilty of murder by confession in open court, the court, from testimony, shall determine the degree of murder, and sentence accordingly."

"*Section* 5.—Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, or commits manslaughter, as defined by the common law, shall be punished by imprisonment not more than 10 years, or by fine not exceeding 1,000 dollars."

"*Section* 8.—Any person residing in this State who, within it, engages to fight a duel, and fights such duel without the State, and thereby inflicts a mortal wound on any person, of which he dies in this State, shall be deemed guilty of murder of the first degree, and punished accordingly; and he may be indicted and tried in the county where the death happens."

"*Section* 9.—A person who by an engagement made within the State, is the second to either party in such duel, and present when a mortal wound is inflicted, of which the person dies within the State, shall be deemed an accessory before the fact to murder of the first degree, and he may be indicted, tried, and punished, as the principal may be."

Chapter 119 (Extract).

"*Section* 1.—Whoever unlawfully and maliciously sets fire to the dwelling house of another or to any building adjoining thereto, or to any building owned by himself or another, with the intent to burn such dwelling-house, and it is thereby burnt in the night time, shall be punished with death. If he proves and the jury find that there was no person lawfully in such dwelling house at the time, or if the offence was committed in the day time, he shall be punished by imprisonment for life."

Chapter 135 (Extract).

"*Section* 7.—Where any person is convicted of a crime punishable with death and sentenced therefor, he shall at the same time be sentenced to solitary confinement and hard labour in the State prison till such punishment is inflicted; but he shall not be executed within one year from the day the sentence of death was passed, nor until the whole record of such proceedings or case is certified by the clerk of said court under the seal thereof, to the supreme authority of the State, and a warrant is issued by said executive authority under the great seal of this State, directed to the Sheriff of the County wherein the State prison is situated, commanding him to carry said sentence of death into execution."

"*Section* 8.—The sentence of death shall, in all cases, be inflicted by hanging the convict by the neck till he is dead, and be executed at the time directed in the warrant within the walls or inclosed yard of the State prison; and the Sheriff of the County, unless prevented by sickness or other casualty, and two deputies designated by him shall be present at the place of execution; he shall request the county attorney and 12 citizens, including a surgeon or physician, and permit the convict's counsel, relatives, and such minister of the Gospel as he may desire, such officers of the prison, deputies, constables, and military guard as the Sheriff sees fit, but no others, to be present."

State of Maine, Office of Secretary of State,
Augusta, January 11, 1865.

I hereby certify that the foregoing extracts from the revised Statutes of this State are truly copied from the originals deposited in this office, and comprise all the laws of the State of Maine relating to Capital Punishment. In testimony whereof I have hereunto set my hand and affixed the seal of the State at Augusta this 11th day of January, year of our Lord 1865, and of the American independence the 89th.

(Seal of State of Maine.) EPHRAIM FLINT,
Secretary of State.

APPENDIX TO MR. W. TALLACK'S EVIDENCE.

A SECOND LETTER from PROFESSOR THOMAS C. UPHAM, of Bowdoin College, Brunswick, Maine, relative to the experience of that State in regard to frequent remissions of the Capital Penalty and the substitution of Secondary Punishment.—[*Addressed to* MR. WILLIAM TALLACK, *Secretary to the Society for the Abolition of Capital Punishment.*]

Brunswick, Maine, U. S. A.,
March 14th, 1865.

DEAR SIR,

I HAVE just received your letter, dated Feb. 24th. I was pleased to find that my previous letter duly reached you. In the letter now before me you wish me to state further, whether there has been in the State of Maine an increase of the higher crimes, particularly murders, since the modification of our laws on the subject of Capital Punishment, nearly 30 years ago. I do not quote precisely your words, but such I understand to be the import of your inquiry.

In answering your question, I wish to say that I have been many years a resident of this State, that I have been personally acquainted with many persons in public official stations, and have been deeply interested during the whole period in question to notice the practical workings and effects of our Criminal Code. And with such and other means of information, and with such a dispo-

sion to inquire, I have never heard it stated, and do not believe it to be the case, that there has been any increase of the higher crimes, except such as may be justly attributable to the increased number of the people and to the anomalous condition in which we have been placed, as a people, during the last four years, by the agitating events and incidents of civil war. And if it were otherwise, and if it could be shown that there has been an increase of the higher crimes, and that too from other causes, I do not believe it could be shown that such increase is justly attributable to that merciful aspect in our Criminal Code which has so much excited the curiosity and interest of our friends abroad. And I will mention here one circumstance which may perhaps tend to support me in this opinion.

In January of 1864 the Governor of the State, who still sustains the office, and is an able, patriotic, and very popular man, recommended to the Legislature to alter the law on Capital Punishment with a view to the restoration of the former methods. The Legislature respectfully and promptly appointed a large committee to inquire into the subject. Opportunity was given to persons from all parts of the State to present before the committee such facts and arguments as might have a bearing upon it. I availed myself of this opportunity in connexion with many others. The result was that the Legislature decided to make no alteration in the existing law; and the law still remains.

This result, I think, could not have been reached if there had clearly been any great increase of the higher crimes, and if that increase had, in their view, been justly attributable to the law which was thus brought under advisement.

And I would add, not in the spirit of boasting, but from no little inquiry and from sincere conviction, that in my view it would be difficult to find a community as large as the State of Maine more free from crime, more characterized by good order, and by all the attributes which go to constitute a moral, intelligent, and virtuous people.

Allow me here to make one remark further. Many persons seem to have the idea that the abolition of Capital Punishment, or its essential modification and diminution, undermines the fabric of Government, by destroying the arm of its executive power. But I think a little reflection will show that the executive power of the Government, that which stands back of and enforces the laws, is not so much found in Capital Punishment as in the military force of the state or nation; that organized force which repels foreign attacks, which assists in arresting criminals and bringing them before courts of justice, and in enforcing punishment. This great reserved power which implies the right of taking life is co-existent with the laws and the duties of the State, and is essential to its maintenance. Capital Punishment, in distinction from the executive power which is lodged in the military arm, is only one of the many forms of punishment, and is to be established, modified, or abolished only by a consideration of the ends of punishment.

If it should be found, on experiment, and in connexion with the progress of civilization, including education, temperance, and equal rights, that the safety of the people can be secured by methods of punishment less revolting than Capital Punishment, then that may safely and justly be set aside, or may assume some mitigated and conditional form.

I remain respectfully yours,

Mr. William Tallack. THOMAS C. UPHAM.

UNITED STATES OF VENEZUELA.

SIR, Caracas, February 10, 1865.

I have the honour to reply to the queries which on the part of Her Britannic Majesty's Secretary of State for Foreign Affairs you were pleased to send me in your communication of the 10th ultimo, and will follow the order in which they were presented.

1st. The penalty of death is not applied in Venezuela to any crime, it having been abolished by Art. 14 of the Federal Constitution, issued on the 13th of April 1864. As far back as the 18th of August 1863, the President of the Venezuelan Federation had, in his Decree of guarantees, proclaimed as the first the inviolability of human life For political offences, Capital Punishment was abolished by the law of April 3, 1849.

2nd. Before said abolition, the President of the Republic could commute Capital Punishments, with the advice and consent of the Government Council, at the representation of the tribunal that took cognizance of the cause in its last instance, or at the excitation of the executive itself whenever important and potent motives demanded it, the exception to the exercise of this privilege being only in regard to those sentenced by the Senate. After the suppression in 1858 of the Government Council, it was sufficient for a co nmutation, that the executive power should first receive the report of the Judge who pronounced the last sentence; excepting this, the other dispositions remaine in force.

3rd. At present the severest punishment is ten years imprisonment. When the penalty of death was commuted to lesser punishment, this latter was carried out in all its latitude. But regarding political offences, it might and did happen, that the minor punishment substituted to that of death, was much shortened by the issuing of an indult. And amnesties, which owing to some extraordinary causes were decreed by the legislative body, would produce the same effect.

4th. The Government has no reason to believe that there has been any increase in the crimes, the penalty of which has been mitigated, either as the result of the mitigation of the punishment, or from any other cause.

5th. When the penalty of death was in force, the execution was by shooting, and always public.

6th. At the time referred to, Capital Punishment was generally commuted, it being reserved only to heinous crimes.

I reiterate, &c., &c., &c.,

(Signed) Rafael Seijas.

WISCONSIN.

An Act to provide for the Punishment of Murder in the first degree, and to abolish the penalty of Death.

Chap. 103.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:—

Section 1. In all convictions under the statutes of this State for the crime of murder in the first degree, the penalty shall be imprisonment in the State prison during the life of the person so convicted; and the punishment of death for such offence is hereby abolished.

Section 2. All Acts and parts of Acts contravening the provisions of this Act are hereby repealed.

Approved, July 12, 1853.

ECUADOR.

1. The offences punishable with death are the following:—Treason against the Republic; counterfeiting the coin of the State; wilful homicide, or death occasioned in a quarrel instigated by the murderer; acts of piracy towards the chief officer or commander of a vessel; wilfully setting fire to a house or houses, church, fortress; and the committing, for a third time, a crime originally punishable with hard labour at the public works for a period of ten years; cowardice before the enemy; desertion in time of war; rebellion and military insurrection.

2 According to the laws of Ecuador, the Courts of Justice cannot forbear pronouncing sentence of death for the commission of such crimes so punishable, even should extenuating circumstances be alleged in favour of the culprit. But the Executive has the power of modifying the sentence of the law by submitting the proceedings of the Court to the consideration of the Council of State, and the following circumstances may operate in favour of the culprit, viz.: previous good conduct in connexion with important services rendered to the State; the same recommendation of character, with the possession of extraordinary practical knowledge of some art or science; or when the crime may

have been perpetrated amidst a plurality of individuals or assemblage of soldiers, any number exceeding twenty. The reduction of the punishment by death must be substituted by another of a less severe nature prescribed by the Penal Code.

3. The most severe punishment that can be inflicted next to that of death is a condemnation to hard labour for a period of ten years.

4. The penalty of death for crimes of a purely political nature was abolished in Ecuador in the year 1852.

5. The penalty of death is a public exhibition, the culprit being shot. The sentence of the law to be carried into execution is announced through the medium of the press; the name, native country, residence, crime, and sentence of the condemned individual are thus made public. Various ceremonies calculated to inspire terror are on these occasions enacted, and are rendered more impressive in proportion to the enormity of the crime committed. Fortunately, however, owing to the peaceful disposition of the inhabitants of Ecuador, more especially of those who reside in the districts of the interior, such scenes are of rare occurrence, only three or four such sentences of death having been carried into execution within the period of five years.

6. The substitution of ten years' hard labour at public works is the alternative of the sentence of death. The Executive, however, as above stated, can interfere in the mitigation of any other crime of a grave description the punishments for which are specified in the Penal Code.

UNITED STATES OF COLUMBIA.

1. None.

2, 3. The severest punishment by the law of the United States of Columbia is ten years' hard labour; and neither the Jury, the Court, nor even the Head of the State has the power to reduce or commute it when imposed on a person found guilty of an offence formerly capital. Such as it is, therefore, that punishment is carried out in full.

4. By the Constitution of the United States of Columbia, issued on the 8th of May 1863, Capital Punishment was abolished. Before that period the extreme penalty of the law was confined to the crime of murder. It is a notorious fact that murder has increased since the promulgation of that Constitution; but whether the increase is to be attributed solely to the diminution of the punishment, as many believe to be the case, or whether, as others contend, it may also be partly ascribed to the anarchy and demoralization consequent upon a long civil war, the termination of which was coincident with the abolition of Capital Punishment, it is impossible to say, as no judicial statistics are published in this country.

USTRALIAN COLONIES.

Sir D. Daly to the Duke of Newcastle.

(No. 27.)

My Lord Duke, Government House, Adelaide, 27th May 1864.

In reply to your Grace's circular despatch of the 24th March, having reference to the mode in which the extreme penalty of the law is carried out in these colonies, I have the honour to inform you that by the Provincial Statute No. 23, of 1858, intituled, "An Act to regulate the Execution of Criminals," (copy of which I have the honour to enclose), the execution of criminals takes place in all cases within the walls or enclosed yard of the Adelaide gaol, except in the case of aboriginal natives, who *may* be executed where the crime was committed, under the provisions of a subsequent Act of Provincial Legislature, No. 1, of 1861, intituled, "An Act to amend the Act No. 23, of 22nd Victoria," copy of which I have also the honour to enclose.

2. With reference to the first point upon which information is desired, viz., "whether the public at large are quite satisfied that the sentence of the law is "in all such cases as fully and completely enforced as if the executions had

" taken place outside the gaol?" I have not the least reason to doubt that the public at large are perfectly satisfied that the sentence of the law, in the instances that have occurred in this province, since the above first-recited Act came into operation, has been as fully and completely enforced as if the executions had taken place outside the gaol.

3. As to the second point, " whether the penalty of death is found to be less " deterrent in consequence of its being inflicted in a comparatively private " manner?" I have not found it so easy to form an opinion, as there have been, I am happy to say, only two occasions since 1854 of the extreme penalty of the law having been carried into execution on white persons.

It would be premature, therefore, to say what has been the effect in this province, on so slight an experience of the working of the Act alone; but I feel quite satisfied, and it is the opinion of those who have the best means of knowing the moral effect of such punishments, that the penalty of death is not less deterrent in consequence of its being inflicted in a comparatively private manner.

4. With regard to the aboriginal natives, however, the case is wholly different, for the simple reason that it is difficult, if not impossible, to convince them that an execution of one of their people has taken place which has not been witnessed by themselves, and this can only be effected by leaving the sentence of the law to be carried out as near as may be to the place where the crime was committed, which in all cases is at a considerable distance from Adelaide, where very few white people have an opportunity of witnessing the execution.

5. I do not believe that any objection is entertained to the present state of the law in respect to capital punishment in this colony, and I feel satisfied that a return to the old system of public executions would be very generally resisted in any of these colonies were such a change to be proposed.

I have, &c.

(Signed) D. Daly, Governor.

His Grace the Duke of Newcastle, K.G.

ANNO VICESIMO SECUNDO VICTORIÆ REGINÆ. A.D. 1858.

No. 23.

An Act to regulate the Execution of Criminals.

[*Assented to 24th December* 1858.]

Preamble. Whereas it is expedient to alter the practice relating to the execution of criminals: be it therefore enacted by the Governor-in-Chief of the province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said province, in this present Parliament assembled, as follows:

Execution to be carried into effect within the walls of the gaol. 1. From and after this Act coming into operation sentence of death passed on any person by the supreme court of the said province, or by any judge thereof, shall be carried into execution by the Sheriff, within the walls or within the enclosed yard of the gaol of Adelaide, or of such other gaol as the Governor may, by writing under his hand, direct.

Sheriff, officers of gaol, &c., to witness execution. 2. The Sheriff, the gaoler, and such of the officers of the gaol as the Sheriff may require, including the medical officer in attendance on the occasion, shall be present at every such execution, together with any justices of the peace, ministers of religion, and officers of police, who may desire to attend, and such military guard and adult spectators as the Sheriff may think fit to admit.

Medical officer to sign certificate and witnesses to sign declaration. 3. Each of the persons aforesaid who may attend or be present at any such execution shall continue and remain within the walls or enclosed yard of the gaol until the sentence shall have been carried into execution and completed according to law, and until the said medical officer shall have signed a certificate in the form set forth in the schedule to this Act annexed marked A, and the Sheriff and the said gaoler and officers of the gaol, and such other persons present as may think fit, shall, before their departure from the gaol, subscribe a declaration according to the form set forth in the schedule to this Act annexed, marked B.

Inquest to be held on the body of every person executed. 4. The Coroner of the district in which any gaol may be situated wherein any sentence of death shall have been carried into execution upon the body of any person, or if there be no such Coroner, then the nearest special magistrate, shall

so soon after as conveniently may be, hold an inquest upon the body of such person, and the jurors of the jury on such inquest shall inquire and find whether such sentence was duly carried into execution.

Penalty for making false declaration.

5. Any person who shall subscribe any certificate or declaration as aforesaid, knowing the same to be false, or to contain any false statement, or who shall bury or remove from such gaol any such body, until after such inquest shall have been duly held, shall be deemed guilty of felony, and being thereof lawfully convicted, shall be liable to penal servitude for any period not exceeding four years.

Certificate and declaration to be recorded and published.

6. Every such certificate and declaration as aforesaid shall be forthwith transmitted by the Sheriff to the Master of the said supreme court, and shall be entered and kept in the office of the said Master as a record of the said court, and shall be published in the "South Australian Government Gazette" on three separate occasions.

Commencement of Act.

7. This Act shall take effect from the first day of January one thousand eight hundred and fifty-nine.

SCHEDULES REFERRED TO.

A.

I, A. B., being the medical officer in attendance on the execution of C. D. at the gaol of , do hereby certify and declare that I have this day witnessed the execution of the said C. D. at the said gaol, and I further certify and declare that the said C. D. was, in pursuance of the sentence of the court, hanged by the neck until his body was dead.

Given under my hand this day of , in the year of our Lord one thousand eight hundred and , at the said gaol.

B.

We do hereby testify and declare that we have this day been present at the gaol of , when the extreme penalty of the law was carried into execution on the body of C. D., convicted at the criminal session of the supreme court held on the day of , and sentenced to death, and that the said C. D. was, in pursuance of the said sentence, hanged by the neck until his body was dead.

Dated this day of , A.D. 18 , at the said gaol.

Sheriff.
Gaoler.
Turnkey.
Constables.
Justices of the Peace.
Other Spectators.

ANNO VICESIMO QUARTO ET VICESIMO QUINTO VICTORIÆ REGINÆ. A.D. 1861.

No. 1.

An Act to amend an Act, No. 23 of 22nd Victoria, intituled "An Act to regulate the Execution of Criminals."

[*Assented to 18th July* 1861.]

Preamble.

WHEREAS by an Act, No. 23 of 22nd Victoria, intituled "An Act to regulate "the Execution of Criminals," it was enacted that sentence of death passed on any person should be carried into effect within the walls or within the enclosed yard of the gaol of Adelaide, or of such other gaol as the Governor, by writing under his hand, might direct: And whereas it may be desirable in certain cases that sentence of death passed on any of the aboriginal natives of the province of South Australia should be carried into effect at the place where the crime for which such sentence shall have been passed was committed: Be it therefore enacted by the Governor-in-Chief of the province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said province, in this present Parliament assembled, as follows:

Aboriginal natives may be

1. It shall be lawful for the Governor, with the advice and consent of the Executive Council, by writing under his hand, to order that any sentence of

death which shall have been lawfully passed on any aboriginal native of the said province may be publicly carried into execution at the place at which the crime in respect of which such sentence shall have been passed was committed, or as near to such place as conveniently may be; and to order that, after such sentence shall have been executed, the body of any such aboriginal native shall be buried at the place of execution, or at such other place as the Governor may deem expedient; and the said Act to regulate the execution of criminals shall not be applicable to proceedings consequent on any such order of the Governor, with the advice and consent aforesaid. Executed where the crime was committed.

2. This Act shall take effect from the 25th day of May 1861. Commencement of Act.

In the name and on behalf of the Queen I hereby assent to this Act.

RICHARD GRAVES MACDONNELL,
Governor.

Government House, Adelaide, 18th July 1861.

Sir J. YOUNG to Mr. SECRETARY CARDWELL.

(No. 62.)

SIR, Government House, Sydney, 21st July 1864.

IN answer to the Duke of Newcastle's circular despatch of 24th March last, I have the honour to state that it is the practice in this colony to execute criminals within the walls of the gaol.

2. The best information I could collect on the two points mentioned will be found in the documents enclosed, viz., in a Minute of the Executive Council of the 14th June last, the answers of the three judges of the Supreme Court, given in separate letters, and in the interesting observations furnished by the Reverend J. West, the editor of the "Sydney Morning Herald," a gentleman who has long devoted attention to this and kindred subjects in this and the neighbouring colonies.

3. All these opinions concur as to the first point, that the public at large are quite satisfied that the executions are fully and completely enforced. There are not, so far as I am aware, any grounds for doubting the correctness of the views so generally entertained.

4. On the second point Judge Milford dissents from his colleagues. As to the deterrent effect on the mind of a person who meditates a crime which will bring his neck into jeopardy, it must, I fancy, remain matter for conjecture which is the more appalling, the being hanged in public before a large crowd, or the undergoing the same fate in the stillness and comparative solitude of the prison yard before a limited number of witnesses. If the consideration of the alternative enter the mind of such a person at all, the addition which the dislike or preference for the one or other mode might make to the fear of death would appear to depend so much on imagination or temperament as to elude calculation; it might vary in different persons.

5. But as to the effect on the crowd which assembles to witness a public execution, there is not, in my mind, the least doubt that evil rather than good results from the spectacle.

6. Clergymen who have visited gaols for years, and attended many criminals at the gallows, have informed me that as a warning public executions are little taken to heart, and that few, if any, in the crowd can bring themselves to believe that do what they may they will be so unlucky as to come to the same wretched end.

7. The same faith in their luck seems to attend, they added, even the condemned, they rarely give up the hope of a reprieve, or think themselves entirely abandoned by fortune until within two or three days of their execution, when the day is fixed and the certainty and immediate prospect of death presented with irresistible force.

8. It may be said that these representations go the length of impairing the reliance on capital punishment as an efficacious deterrent from crime; to a certain extent they do so,—but they also apply, though in a minor degree, to all punishments, to death only more because the chances of escape from it are usually, from various causes, greater than from other punishments, and the hopes of escaping far greater even than the chances.

9. Temptations which lead to crime are for the most part yielded to without any thought of the consequences, even when crime is committed or the liability

to the penalty incurred, the hope of escape still remains, and the sanguine reliance of each individual on his own good fortune; for many who commit offences do escape, and punishment does not by any means always overtake the guilty. It is, they said, this calculation of impunity which more than anything else lessens the dread and efficacy of the penalties of the law, and especially of the extreme and most severe penalties.

10. But to return to the immediate subject in hand, it is held by my informants that a public execution is not more deterrent than a private one, that it is not needed by general opinion to proclaim the fact of the punishment, and that it serves no good purpose of warning or example. They, therefore, deprecate public executions as exhibitions which are calculated to revolt and demoralize, but which cannot inspire to virtue, nor awake desirable emotions in any breast.

I have, &c.
(Signed) JOHN YOUNG.

The Right Honourable
Edward Cardwell, M.P.,
&c. &c. &c.

PROCEEDINGS of the EXECUTIVE COUNCIL on the 14th June 1864, with respect to a Despatch from the Secretary of State for the Colonies, having reference to the effect of Capital Punishment inside a Gaol.

Minute 64/22, 14th June 1864. Confirmed 17th June 1864.

HIS Excellency the Governor lays before the Council a Minute, paper Z. The Honourable the Colonial Secretary submitting a circular despatch from the Secretary of State for the Colonies, relating to capital punishments inside gaols, and requesting information on the following points:—

1st. Whether the public at large are quite satisfied that the sentence of the law is in all such cases as fully and completely enforced as if the executions had taken place outside the gaol; and,

2nd. Whether the penalty of death is found to be less deterrent, in consequence of its being inflicted in a comparatively private manner.

2. The Honourable the Colonial Secretary recommends that the first question be answered in the affirmative, and the second in the negative.

The Council concur in the recommendation of the Honourable the Colonial Secretary, and advise accordingly.

(Signed) ALEY. C. BUDGE,
Clerk of the Council.

Supreme Court, June 23, 1864.

MY DEAR CHIEF JUSTICE,

As the Colonial Secretary wishes for the opinion of the judges on the two questions regarding the private infliction of capital punishment, I will be obliged by your forwarding this with any answers you and Mr. Justice Wise may think it right to make.

As to the first question whether the public at large are quite satisfied that the sentence is in such cases as fully and completely enforced as if the execution had taken place outside the gaol. I do not hesitate to say that in my opinion the public are quite satisfied that such is the case.

As to the second question whether the penalty of death is found to be less deterrent in consequence of its being inflicted in a comparatively private manner, I do not know whether or not *it has been found* to be less deterrent, but in my opinion it must have that effect. The object of capital punishment is to alarm and deter persons predisposed to crime from committing it. That the reading a paragraph in a newspaper can have an effect in producing a fear of the consequence of crime as powerful as seeing an execution, appears to me to be absurd. There may be other grounds for objecting to public executions, but they do not arise from the want of the strong impression which an execution must produce on a spectator.

A frequent view of the death of a criminal may harden the heart and lessen its effect, but I apprehend it is not many that frequent these scenes, but even

with such the effect if deterrent at all must be much more powerful than the report of the execution by a public print or an eye-witness.

I have, &c.

(Signed) SAMUEL FREDERICK MILFORD.

Sir Alfred Stephen, Knight, K.C.B.

SIR, Supreme Court, July 16, 1864.

I REGRET that circumstances have hitherto delayed my answer to the questions proposed to myself and my colleagues, for the information of Her Majesty's Secretary of State for the Colonies, respecting the effect on the public mind of the private execution of criminals, directed by our local enactment of 1853, the 17 Victoria No. 40.

2. As to the first of those questions, there can I think be no doubt whatever that the entire community are quite as fully satisfied of the fact, that execution has in every instance been actually carried out, as if each individual in the colony had witnessed the death with his own eyes.

3. The number of those who witnessed the hanging of a criminal, under the system of public executions, was always comparatively small, and composed, with few exceptions, of the lowest and most depraved classes. It was not on the testimony of men and women of that stamp, that the great bulk of the community have ever recognized the fact of any execution. Now, however, it may be said, such persons are practically excluded from the possibility of satisfying themselves, as formerly they could do. The fact is not altogether so. But these classes, whatever their tendency to distrust and suspicion, must know perfectly well that there can be no motive for deception, on the part of the Government or its officials, in a matter of this kind; or if, in some very rare instance, such as that of a criminal well born or connected, there might be reason to apprehend incredulity by the mob, it would be easy by increasing the number of witnesses effectually to bear it down.

4. By the statute cited, any number of justices at their own discretion, and any number of unofficial spectators at the discretion of the sheriff, may be admitted; and the execution must be witnessed, and the fact certified in writing, by that officer or his deputy, the surgeon, the gaoler, and one or two others; in point of fact, every certificate is usually signed by about eight or ten known and credible persons. It is twice published (as the law requires) in the Government Gazette, and any false statement in it is punishable as a felony. In addition to this official publication, there is generally a detailed account of the execution, in one or more of the newspapers, by a reporter who has obtained admission for that purpose. In all cases, moreover, in this colony, the dead body is delivered up to the relatives if demanded, and if not demanded it is buried in the public burying ground.

5. There is, in short, no room for doubting the reality of the execution in any case, and I am certain that no such doubt ever has been entertained in any quarter as to the execution of any criminal whatever under the present system.

6. To the second question proposed by the Secretary of State, I have no hesitation in giving as my answer, that I believe the system of private executions to be quite as deterrent in its effect as public executions ever were, or more so.

7. It would obviously be impossible to prove, however, that this has been the effect—the conclusion can, after all, be matter of opinion merely. We know that, under certain circumstances and in certain states of society, no punishments whatever will wholly deter men from particular crimes; and no alteration in the mode of inflicting any such punishment, the same condition of things continuing, would be likely to have any influence on the persons predisposed to crime, either deterrent or the reverse. But one thing, the result of an experience in these colonies of 35 years, I do to a certainty know, and it is this,—that the punishment most dreaded, and in most cases the only one really dreaded, by men tried or about to be tried for crime, is the punishment of death. And I as certainly know, from the concurring testimony of clergymen and others whom duty or accident has led to witness public executions, and with whom I have conversed on the subject, that nevertheless death at the last frequently, if not generally, failed to retain its horrors because of that very publicity. For the excitement produced by the appearance of the crowd below,

some of them his associates in guilt, thieves, and prostitutes, tended naturally to induce in the object of this curiosity and interest a spirit of vanity or bravado, with the desire to appear unconcerned and indifferent, and the effect of the example in all such cases was, of course, to a great degree if not wholly lost as to the spectators; at all events it would scarcely be too much to say, that examples of such a kind are altogether evil in their effect, and incentives to crime rather than deterrent from it.

8. I have long been of opinion, therefore, on this ground alone, utterly irrespective of any other, that the adoption by law of a system of private executions would be largely beneficial to the community; and in this opinion I am confirmed by the experience and results of the last ten years during which the system has been in force in New South Wales.

9. It would, as already suggested by me, be impossible to show that crime has diminished under the system, because population has enormously increased during that period, and circumstances in the interior have operated greatly to encourage particular crimes; not the least being the facility with which they are committed, and with which the criminal knows that he can for years escape apprehension, and in many cases defy every effort to establish his guilt. But I maintain that the punishment of death inflicted in private has nevertheless continued to be, and is, more dreaded, and therefore has probably tended more to restrain capital crimes than dread of the same punishment inflicted in public, or than the infliction of any other punishment would have done. We have now no longer scenes of excitement or display at the gallows; all is solemnity and calm; there may be a relative or a friend present, but there is no sympathising mob; there are none who come to see if their favourite will die *game*. The spectators are chiefly those only whom the law appoints to see that its sentence is obeyed. Death under such circumstances as these has not the usual solace of the ruffian. On the other hand, if the sufferer be an object of hatred, there is no opportunity for its exhibition. The man feels the awful solitariness of his position; but his dying hours are not disturbed. While the certainty, yet comparative secresy of his death, give to the event an impressiveness which it is on all hands admitted that a public execution has rarely, if ever, produced among any community.

10. If there really could be any doubt in the minds of the depraved, or others, of the fact of the execution having taken place, there might be so far an argument against the new system. But the idea of doubt in such a matter, I confess, appears to me, in the actual state of things, to be preposterous. To what extent indeed should we not have to go to remove this imaginary scepticism? Are actual witnesses alone supposed to be the believers? If so, of what avail is even the publicity which has been tried? For how small is the proportion, in any instance, which these have borne to the absentees! The argument, however, if worth anything, goes to this extent; that every member of the community ought to be present at an execution, since all who are not so may not be persuaded that it has occurred.

11. Should the argument be simply that those who are absent will not so forcibly be impressed with the example, I answer by asking what deterrent effect is likely to be produced on the mind of any person who witnesses (and probably often) such scenes of hardihood and display, not to say recklessness and levity, as those to which I have referred in this letter. I might further suggest this; that even if we could insure equal decorum at the scene of death, under each system, the mere act of witnessing in a crowd the short struggle, for such it generally is, or seems to be, of a man who meets his fate firmly, and with apparent indifference, is not likely by any means to be so efficacious in inspiring dread on the minds of spectators, or those who hear the account from them, as the knowledge derived by all from a cold official notice, merely that the man has in fact been hanged; and that this has taken place in the presence of those only who sign the certificate, or possibly a few others, in privacy, with no associate band around or near him. No one acquainted with human nature, I conceive, can hesitate to conclude which of the two sets of circumstances is the more appalling to ordinary minds.

I am, &c.

(Signed) ALFRED STEPHEN.

The Right Hon.
Sir John Young, Bart., K.C.B.,
&c. &c. &c.

Supreme Court, Sydney,
July 19, 1864.

Sir,

In reply to your request that the judges would give their opinions on the questions asked in the circular from Her Majesty's Government, dated March 24th, 1864, I beg to state, first, that, in my opinion, the public at large are quite satisfied that the sentence of the law is as fully and completely enforced as if the execution had taken place outside the gaol.

The present system was in force upon my arrival in the colony, and I cannot, therefore, draw any comparison from actual observation of the two systems, but I have no hesitation in expressing my decided opinion that, in the interests of public morality and decency, the existing system is the best.

I must indeed except from this opinion the practice adopted here of giving up the body of the criminal to his friends. I do not think this ought to be done. It gives opportunity for the most indecent and improper expressions of public feeling, rarely at such times influenced by any just perception of right and wrong, and extremely liable to be roused into morbid display by the efforts of persons who, from various reasons, political or otherwise, may think fit to attempt to excite dissatisfaction with the administration of justice.

A most marked instance of the evil of this practice occurred when the body of Manns was given up last year. He had been found guilty upon the clearest evidence of having, in company with several others, under the leadership of Gardiner, attacked the gold escort in the most cowardly and murderous manner, and wounded one of the policemen in charge. After his conviction, or at least after his arrest, he became a Roman Catholic, and this circumstance doubtless assisted to surround him with a special interest. The further unfortunate circumstance that the executioner had blundered in the performance of his office, so that the poor culprit's sufferings were unusually prolonged, still further increased the public excitement. His body was, I believe, exhibited in a public house and visited by hundreds, before its final removal to the place of burial about 40 miles up the country. No occasion should be given for stimulating pity for the criminal, and so lessening the horror of the crime.

The second question is whether the penalty of death is found to be less deterrent in consequence of its being inflicted in a comparatively private manner.

The deterrent effect of capital or indeed any punishment is a most difficult question, and one on which it is almost impossible to give any very decided opinion. Motives to action, still more motives to abstain from yielding to temptation, are shrouded in the deepest obscurity, and if this be true as to people in general, it is still more true as to that class from which criminals are chiefly drawn. Their very want of education for right, and their too frequent education for wrong, sets at defiance all rules of conduct drawn from the observation of ordinary men.

I see no reason to doubt, however, that private executions are as deterrent as public. For the community at large the fact of execution is fully established, and the solemnity of the ceremony is likely to leave a deep impression upon the other prisoners, who are locked in their cells while the execution is going on, and the bell is tolled to mark the awful event.

In addition to this, private executions are free from everything calculated to excite the culprit to a false exhibition of bravado, and the depraved taste of those who would attend to witness an execution, whether themselves belonging to the uneducated or criminal classes or not, is not gratified. I have confined myself to replying to these two specific questions, but I cannot forbear adding, that in my opinion the propriety of capital punishment in any given case is by no means concluded by determining (if it were possible) the amount of deterring effect produced by such punishment.

I apprehend that in addition to the object of deterring others, capital punishment is inflicted for the purpose of protecting society against further outrages, and also to prevent the shock to public morality which would inevitably be produced by great criminals being, after a period more or less protracted, let loose upon the world. That perpetual imprisonment would be enforced in very few cases is my firm opinion, especially if the political institutions of the country tend to increase the inducements to public men to yield to private influence rather than the strict requirements of justice (see

for an illustration, Lieber on the Abuse of the Pardoning Power, Civil Liberty, p. 390).

I have, &c.
(Signed) EDWARD WISE.

The Right Hon. Sir John Young.

Offices of the Sydney Morning Herald,
June 14, 1864.

MY DEAR SIR,

I HAVE the honor to acknowledge a copy of a circular despatched from Downing Street, addressed to yourself. In this despatch it is stated that Her Majesty's Government are anxious to obtain all the information in their power respecting the effects resulting from the execution of criminals within the walls of gaols, and request to know whether the system is adopted in the Colony under your government, and if so,—First, whether the public at large are quite satisfied that the sentence of the law is in all cases as fully and completely enforced as if the executions had taken place outside the gaol? and, secondly, whether in your own opinion and that of those who have the best means of knowing the moral effect of such punishments, the penalty of death is found to be less deterrent in consequence of its being inflicted in a comparatively private manner?

The passing of the law to authorize the infliction of capital punishments within the precincts of a goal received, I think, the almost universal approval of this community. The only class to whom it could be deemed unacceptable consists of that small number of persons who usually visit executions. I doubt, however, whether even these much regretted the change. When a sight was to be seen they were accustomed to avail themselves of it; but since it was withdrawn under the authority of the law so far as I am aware no murmuring has ever been heard. Where a goal is situated to afford a chance of seeing anything connected with an execution certain numbers still assemble, such as on the sand hill, whence I understand they can see the undulation of the rope on the fall of the culprit. There are however few spots so favored. In some of our colonial gaols the limits within which the execution takes place are very narrow. At Hobart Town, for example, the area is too small to admit but a very limited number of spectators, no doubt has ever been suggested of an execution having actually taken place or of the identity of the criminal.

It is my opinion that many criminals would prefer private execution, and on the other hand that some would greatly prefer the little excitement and ceremony by which a more public death is attended; but probably these are considerations which would not be deemed of any importance. It must nevertheless be very appalling to a criminal to be taken from the darkness of his cell into the narrow gaol yard and there in the presence of a few, hardly sympathising countenances, close his miserable life.

In reference to the deterring influence of capital punishment so inflicted it is difficult to form any opinion. Does the punishment of death actually deter from crime at all? Is it not rather a satisfaction to the public sense of justice than a means of preventing crime? There are cases of course where a criminal intention will be arrested by the fear of capital punishment, but I apprehend they are not so numerous as to supply any imperative motive to a public policy. Does the abstraction of the element of publicity decrease the terror of capital punishment? We, in this colony, can only form a general conjecture, having no experience sufficient for a sound or certain conclusion. In my opinion, we do not deter materially from such crimes by either public or private executions, but we do satisfy the feeling that a murderer ought to be hanged, and withdraw from the relatives of the murdered man all pretensions to private revenge. If we were to surround the penalty of murder with all imaginable horrors does the experience of past ages show that murders would be fewer than they are?

The punishment is nearly confined to cases of murder and feloniously wounding, and does not present itself to the public as the inevitable close of a life of ordinary crime. It is always understood that murderers are not in equal proportions furnished by that class on whom the apprehension of punishment may be supposed to rest as a lifelong feeling. As a mere spectacle

capital punishments can only influence a very small number, supposing publicity to have any deterring power. The people who attend executions are pretty much the same as in the case of those who frequent pugilistic encounters. And I fear they do furnish in considerable proportion the criminals who from time to time afford the spectacle they frequent, but this would rather show that the sight of the gallows has no deterring power, and that, therefore, private or public it is the punishment of death itself as the doom of the guilty that deters from crime.

I doubt greatly if any experience we have had in these colonies would be of much avail to Her Majesty's Government in their determination of this point. Has the law been tried long enough or under those peculiar conditions of society when suspicions could arise of the wrong criminal being executed, or of execution being evaded? Is not publicity an element which becomes important in proportion as population is more numerous and the field upon which suspicion and rumour operate more wide? Would not private capital punishments, which may be safe in quiet and ordinary times become doubtful in times of insurrection and general distrust, when those holding power would be suspected of all sorts of cruelties or subterfuges? Would not the danger of this distrust be aggravated should the ordinary courts of law cease to be in operation and any military form of trial supersede them? I have a strong impression that public executions in the centre of a great city, calling together hundreds and thousands of people, must have a moral result very undesirable; but at the same time it is not equally clear to me that executions within the walls of prisons will in all circumstances meet the objects of capital punishment, or in all conditions of society prevent those rumours and popular expressions which it is so easy to excite and so difficult to allay. Even within my recollection a very common notion prevailed of the escape of certain great and wealthy criminals by the connivance of the authorities while they seemed to be subject to the last severity of the law.

The objection to the public execution of criminals lies very near to the objection to capital punishment in any form. The abolition of this publicity is unconsciously, perhaps, an attempt to reconcile the humane spirit of the age with the stern requirements of public safety. I, therefore, suspect that the infliction of this punishment within the precincts of a gaol is but one step more towards the abolition of capital punishment altogether. At present there is not so strong a feeling in favour of this last measure as within my remembrance, but there is notwithstanding a steady current moving society onward in that direction, and I look upon the change we have adopted as denoting a stage toward total abolition.

I am not sure whether in these remarks I have not gone beyond the scope of your Excellency's inquiry, but it seemed to me that a simple affirmative to the first query and negative to the second would not convey my impression of the whole facts of the case, or the value of our local or personal experience in considering this important subject.

I have to apologise for delay in answering your note which has been caused by sickness.

I have, &c.
(Signed) JOHN WEST.

GOVERNOR SIR G. F. BOWEN to the DUKE OF NEWCASTLE.

(No. 25.)

Government House, Brisbane, Queensland,
June 14, 1864.

MY LORD DUKE,

I HAVE the honour to acknowledge the receipt of your Grace's circular despatch of the 24th March ultimo, desiring information respecting the effects resulting from the execution of criminals within the walls of the gaol, as is now the practice in Australia.

2. This mode of execution was prescribed by the new South Wales Act, 17 Victoria, No. 40, entituled "An Act to regulate the Execution of Criminals," which was passed in 1853, and was continued in force in Queensland on the separation of this colony. (See *Statutes of Queensland*, vol. 1. p. 396.)

3. It will be seen that it is provided that the sheriff or his deputy, shall be present at all such executions, together with the gaoler and the officers of the

gaol, including the medical officer, and such constables, military guard, and other spectators as the sheriff may think fit to introduce. Admission is always granted to the representatives of the public press, and to all respectable persons who may request it. It is to be observed, moreover, that all justices of the peace have a legal right to be present, ex-officio, and without asking permission, and that in the Australian colonies as compared with the United Kingdom, magistrates are much more numerous in proportion to the general population, and far more widely diffused throughout the different classes of society. It is further provided by the Act that the medical officer of the gaol shall sign a certificate, and that the official and other spectators shall sign a declaration, to the effect that the sentence of the law has been duly carried out. In fact a sort of coroner's inquest is held on the body of the criminal immediately after his execution. The certificate and declaration referred to must be recorded in the Supreme Court of the colony, and published in the "Government Gazette" on two separate occasions. Any person who shall subscribe either of these documents knowing them to contain any false statement, is declared guilty of felony, and is liable, on conviction, to a very heavy punishment.

4. I lost no time in requesting the opinions of the two judges who form the Supreme Court of Queensland, on the questions propounded in your Grace's despatch.

In reply, the chief justice, who arrived from England little more than a year ago, excuses himself on the ground that he "lacks the local experience, in the "absence of which he is hardly competent to offer an opinion." His colleague (Mr. Justice Lutwyche) replies as follows:—"The first question on which the "Imperial Government desires information is this, Whether the public at "large are quite satisfied that the sentence of the law is in all such cases as "fully and completely enforced as if the executions had taken place outside "the gaol. In answer to that question I may state that, in my opinion, the "public mind is quite satisfied on that point. I have had 10 years experience "of this mode of execution, five spent in New South Wales and five passed in "this colony. The representatives of the press are always admitted inside the "gaol as spectators whenever the execution of a criminal is about to take "place. They inform the public the next day through the newspapers of all "that has happened. I never heard a doubt expressed as to the sentence of "the law having been fully carried out. As to the second question on which "the Imperial Government desires information, namely, Whether the penalty "of death is found to be less deterrent in consequence of its being inflicted in "a comparatively private manner, I can only say that, in my opinion, such is "not the case. The certainty of punishment is the best prevention of crime; "and, although I have often heard the abolition of capital punishment advo-"cated, I never heard any doubts expressed as to the complete efficiency of "execution within the walls of the gaol."

5. I have further consulted my Executive Council, the leading members of the colonial legislature of all parties, and other persons who have the bes means of knowing the moral effect of capital punishments; and I find that their views, on both the points mooted, entirely coincide with those of the judge quoted above. In fact, so far as I can ascertain, there is no difference of opinion on the subject in this community.

6. As my own personal opinion is requested by your Grace, I may be permitted to state that I came to Australia with the feeling of approval, or, perhaps, rather of acquiescence in the practice established in England, which would seem to be the sentiment of the majority of Englishmen with regard to the question under consideration. But I confess that I have seen reason to modify my former views very considerably. In the first place, the general concurrence of all thinking men here, after a practical experience during 11 years of the new method of execution, is of itself entitled to much weight. Further, the system adopted in these colonies at once gets rid of the demoralizing consequences, which (as it is universally allowed) results from the assemblage of such mobs as in all large towns gather round the gallows when erected outside the gaol. On the other hand, the press of Australia gives quite as full, or even fuller details than the press of England of every execution, including the appearance and demeanor of the criminal. It would appear to follow that the general certainty with regard to the actual carrying out of the sentence, and the general deterrent effect of capital punishment must be the same in Australia

as in England, with regard to the general public, that is, with regard to every one except the few hundreds or thousands who may crowd round the scaffold at the Old Bailey and other similar places. It is believed that the actual eye-witnesses of public executions in England belong, in the great majority of instances, to the criminal classes; and it may, of course, be alleged that these are the very classes in which it is expedient to inspire terror. It remains to strike a balance between this last consideration and the consideration of the undoubted demoralizing consequences in all other respects of such assemblages.

7. Again, it has been argued with some force that the advocates of public executions are bound in consistency to urge a return to such processions as formerly took place to Tyburn in London, and to the Grassmarket in Edinburgh, for it makes comparatively little difference to the great majority of the community on which side of the wall of the gaol a criminal may suffer provided that his death is certain. It is the certainty rather than the publicity of punishment which acts as the surest preventive of crime. Some portion of mystery is, indeed, a powerful ingredient in the fears of men. It is believed by many persons that the private executions which took place in former ages within the Tower of London and the Bastille of Paris, in the cells of the Inquisition in Spain, in the dungeons of the Council of Ten at Venice, and in the Kehmic Tribunals in Germany, inspired a wider sense of terror than the scenes now periodically enacted in front of Newgate. It will be recollected that the ancient Greek historians, when recording the fate of state criminals, and of the victims of revolutions, often heightened the effect of the narrative by simply stating that they "were made to disappear."*

8. It seems a further point of much importance that even the most atrocious criminals generally assure a show of bravado, and attempt to "die game" (as they phrase it), when led forth to suffer before a multitude composed, in a large degree, of sympathising associates in guilt. Nothing of this kind happens when the execution takes place in the presence of only the officers of justice, and of a select number of spectators who regard heinous crime with aversion. A murderer who was lately hanged within the precincts of the gaol at Brisbane, was so completely paralysed with abject fear of death that he was unable to walk up the steps of the scaffold. As the officials present shrunk from helping the hangman in his work, several of the Australian aborigines who happened to be in prison for some minor offence, were directed to carry the condemned man to the drop. Their black, lythe, naked figures, and wild savage faces, grinning with fiendish glee at assisting in putting to death one of the white lords of the soil, contrasted with the pale, agonized features and drooping form of the convict, vividly reminded some of the few spectators of those pictures of the Last Judgment which represent the devils hurrying sinners to their doom. Is not a scene like this, when described in minute detail in all the public journals, more likely to produce a deterrent effect than a scene such as that recently described in the London newspapers, when a convict named Wright, executed in front of Horsemonger Lane gaol, was received by the multitude with enthusiastic cheers, and stood bowing on the scaffold like a popular actor on the stage, in acknowledgment of the applause with which he was greeted?

9. It might, I think, be expedient that, in addition to the provisions of the "Act to regulate the Execution of Criminals," as detailed in the third paragraph of this despatch, some signal should be made from the gaol to show the exact moment at which the sentence of the law is carried out. I have suggested that this object should be obtained in Queensland by hoisting a black flag over the prison on the morning of an execution, and hauling it down at the moment when the criminal is launched into eternity.

10. From the pressure of other business, I have been forced to string the above observations together in much haste, and I am fully aware that they may appear to be somewhat crude and ill-digested. But I offer them for what they are worth, in reply to the two questions proposed in the circular despatch of the 24th March ultimo.

I have, &c.,

His Grace the Duke of Newcastle, K.G., &c. &c. &c. (Signed) G. F. Bowen.

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* *Ἠφανίσθησαν.* Cf. Thucydides, iv. 80, Herodotus, iii. 126. Xenophon, Memo. i. 2, 53: Arab., i. 6, 11.

CAPITAL PUNISHMENT.

Information is requested on the two following points:—

1st. Whether the public at large are quite satisfied that the sentence of the law is in all such cases as fully and completely enforced as if the executions had taken place outside the gaol; and,

2nd. I wish to ascertain whether in your own opinion and that of those who have the best means of knowing the moral effect of such punishments, the penalty of death is found to be less deterrent in consequence of its being inflicted in a comparatively private manner.

GOVERNOR GORE BROWNE to the DUKE OF NEWCASTLE.

(Despatch No. 43.—Executive.)

Government House, Hobarton, Tasmania,
May 23, 1864.

MY LORD DUKE,

I HAVE the honour to acknowledge the receipt of your Grace's circular despatch 24th March 1864, desiring information respecting the effect resulting from the execution of criminals within the walls of the gaol.

Sheriff to Governor. 18th May 1864. Under Sheriff. 18th May 1864.

2. In reply, I have the honour to enclose memoranda from the Sheriff, who is also Comptroller-General, and from the Under Sheriff. Both these gentlemen have been long resident in the colony, and have had great opportunities of formimg correct opinions on the subject.

3. I agree with the Sheriff and Under Sheriff in thinking that the public are perfectly "satisfied that the sentence of the law is in all cases as fully and "completely enforced as if the execution had taken place outside the gaol."

4. In reply to the second question, I beg to be allowed to say that in my opinion the penalty of death is more instead of "less deterrent in consequenee "of its being inflicted in a comparatively private manner."

5. Among criminals there is a strong feeling of esprit de corps, and individuals are much influenced by the opinion of their own class. To commit daring acts while living, to die game, and be remembered as a sort of Jack Sheppard, is the ambition of the criminal classes, as may be seen by the literature which alone appears to interest them, and which doubtless has considerable influence, not for good, among them.

6. I believe, therefore, that inasmuch as private execution removes the opportunity for display, it withdraws a stimulant which operates on the criminal population in a manner not much unlike that in which laudable ambition acts on the soldier.

7. The effect of public execution on the class of persons who assemble to witness it, among whom there are usually a large number of women and children, is demoralizing in the extreme. The conduct of the mob is frequently ribald and disgusting, and when sympathy is displayed it is generally with the condemned, and certainly not with the law under which he is about to suffer. In the rare instances where public feeling is against the condemned, the spectacle serves to harden and brutalize those who can witness it without compassion. But I should waste your Grace's time were I to dilate on a subject which is so constantly and so graphically described by the press.

8. As regards the public, therefore, I consider that executions in private put an end to scenes which must have a most demoralizing effect.

9. With regard to the condemned, it must be remembered that the seclusion of a few days or weeks, even when they are penitent, cannot make them entirely indifferent to the opinions of those with whom they have associated through life, and which have probably exerted great influence on them up to the time of their arrest. When, therefore, the execution is public, thoughts which ought to be undisturbed by considerations of this world, are too often distracted by preparation for performing the part of hero in the closing scene of the drama of life. But when the execution is private this distraction is removed, and the condemned man is left to the uninterrupted contemplation of matters connected with that other world into which he is about to enter.

I have, &c.

His Grace the Duke of Newcastle, &c. &c. &c.

(Signed) T. GORE BROWNE.

Mr. Nairn to Governor Gore Browne.

(Tasmania.)

Memorandum, Sheriff's Office, May 18, 1864.

With reference to the Secretary of State's circular despatch of 24th March last, relative to the execution of criminals within the walls of the gaol, I have the honour to state that public executions were abolished in this colony in the year 1855, under an Act of Council, No. 2, 19th Victoria, copy of which I enclose. I also enclose copy of the first Gazette notification of a criminal having been privately executed under the terms of the Act.

With regard to the two points upon which information is sought, I have to state, as to the first, that I have never heard the slightest doubt expressed as to the law being carried out as effectually under the arrangement in force for a private execution, as it would be by a public execution. As to the second point, I can only say that I do not believe myself that the penalty of death has been rendered less formidable by the substitution of a private for a public execution; and during the nine years that the law has been in force, I have never heard from any officer connected with the management of convicts, or from any officer of the police that the change has in any way, in his opinion, diminished the dread that may be held to have been attached to capital punishment.

(Signed) W. Nairn,
Sheriff and Comptroller-General of Convicts.

His Excellency the Governor,
&c. &c. &c.

Extract.

The Hobart Town Gazette, Tuesday, February 26th 1856.

Registry Supreme Court, Hobart Town,
19th February 1856.

The following declaration and certificate are published in pursuance of directions contained in the Act of Council 19th Victoria, No. 2, intituled "An "Act to regulate the Execution of Criminals."

(Signed) Wm. Sorell,
Registrar Supreme Court.

We the undersigned, do hereby declare and testify that we have this day been present when the extreme penalty of the law was executed on the body of John Mellor, lately convicted at the Supreme Court, held at Hobart Town, and sentenced to death; and that the said John Mellor was in pursuance of the said sentence "hanged by the neck until his body was dead."

Dated at Hobart Town this 19th day of February 1856.

(Signed) W. Nairn, Sheriff.
T. J. Crouch, Under Sheriff.
Thomas Capon, Gaoler.
Thomas Blore, Turnkey.
George Hadley, District Constable.
James Gabriel, Constable.
Thomas Gibbin, Visiting Magistrate.
Samuel Moses, Visiting Magistrate.
John Bennett, Javelin Man.
James Flanagan, Javelin Man.

I, William Benson, being the Medical Officer, of the prison at Hobart Town, do hereby declare and certify that I have this day examined the body of John Mellor, lately convicted and sentenced to death at the Supreme Court, held at Hobart Town, and I further certify that, upon such examination, I found that the body of the said John Mellor was dead.

Given under my hand this 19th day of February 1856.

(Signed) W. Benson, Surgeon.

ANNO DECIMO-NONO VICTORIÆ REGINÆ.

No. 2.

By his Excellency Sir Henry Edward Fox Young, Knight, Captain-General and Governor-in-Chief of the island of Van Diemen's Land and its Dependencies, with the advice and consent of the Legislative Council.

An Act to regulate the Execution of Criminals.

[8th August 1855.]

Preamble.

WHEREAS it is expedient that the practice of executing criminals publicly should be discontinued, and that the execution of criminals should henceforth be carried into effect privately within the walls of the prison: Be it enacted by his Excellency the Governor of Van Diemen's Land, by and with the advice and consent of the Legislative Council thereof, as follows:—

Executions to be carried into effect privately within prison.

1. Whenever judgment of death shall have been passed upon any person, and a day fixed for the execution of such judgment, the sheriff, under sheriff, or some deputy appointed by the sheriff, shall execute, or cause the same to be executed, privately within the walls of the prison mentioned in the warrant for the execution of such judgment, or within the enclosed yard of such prison.

Sheriff, &c. to witness execution.

2. The sheriff, under sheriff, or deputy as aforesaid shall be present at such execution, together with the gaoler and proper officers of the prison, and all magistrates who shall think fit, and such constables, military guard, and adult male spectators as the said sheriff, under sheriff, or deputy as aforesaid may think fit to admit.

Witnesses to sign declaration that execution effected.

3. All the persons as aforesaid attending such execution shall remain in the said enclosed place until execution shall have been done according to law; and the said sheriff, under sheriff, or deputy, and the said gaoler, officers of the prison, and constables, and such other persons present as may think fit, shall, before their departure from the prison, subscribe a declaration according to the Form No. 1 in the schedule annexed.

Medical officer to certify that body dead.

4. After such execution, and on the same day, the medical officer of the prison shall examine the body of the person executed, and shall sign a certificate in the Form No. 2 in the schedule annexed.

Penalty for false declaration or certificate, &c.

5. Any person who shall subscribe any such declaration or certificate knowing the same to be false, or to contain any false statement, shall be deemed guilty of felony, and being thereof lawfully convicted, shall be liable to be kept in penal servitude for any period not exceeding ten years, or to imprisonment with or without hard labour for any period not exceeding three years.

Complete execution to be recorded in the Supreme Court.

6. Every such declaration and certificate as aforesaid shall be transmitted by the sheriff, under sheriff, or deputy as aforesaid (whichever shall be present at such execution) to the registrar of the Supreme Court at Hobart Town, and shall be entered and kept in his office as a record of the said court, and shall be published in the "Hobart Town Gazette" on two separate occasions.

Commencement of Act.

7. This Act shall commence and take effect on the first day of October next.

SCHEDULE.

No. 1.

WE, the undersigned, do hereby declare and testify that we have this day been present when the extreme penalty of the law was executed on the body of [*C.D.*], lately convicted at the Supreme Court held at
and sentenced to death; and that the said [*C.D.*] was, in pursuance of the said sentence, "hanged by the neck until his body was dead."

Sheriff, under sheriff, *or* deputy sheriff.
Gaoler.
Turnkey.
Constables.
Magistrates.
Other spectators.

No. 2.

I [*A.B.*], being the medical officer of the prison at do hereby declare and certify that I have this day examined the body of [*C.D.*], lately convicted and sentenced to death at the Supreme Court held at

and I further certify that, upon such examination, I found that the body of the said [*C.D.*] was dead.

Given under my hand, this day of 185 .
A.B.

MICHAEL FENTON, Speaker.

Passed the Legislative Council this seventh day of August, one thousand eight hundred and fifty-five.

FR. HARTWELL HENSLOWE,
Clerk of the Council.

In the name and on the behalf of Her Majesty I assent to this Act.

H. E. F. YOUNG, Governor.

Government House, Hobart Town,
8th August 1855.

NEW SOUTH WALES.

SIR JOHN YOUNG to MR. CARDWELL.

SIR, Government House, Sydney, August 12, 1864.

I HAVE the honour to refer to my despatch, No. 62, of date 21st July last, and in connection with it, to forward a paper on the subject of Capital Punishment, drawn up by the Chief Justice of this colony, Sir Alfred Stephen.

The suggestions which he offers, founded as they are on his own long experience, will he hopes receive consideration, and be found of use in the inquiry now proceeding in England.

I have, &c.

The Right Honble. Edward Cardwell, &c. &c. &c. (Signed) JOHN YOUNG.

LETTER from SIR ALFRED STEPHEN to SIR JOHN YOUNG.

SIR, Lynn's Terrace, July 19, 1864.

IN my letter to your Excellency respecting private executions, I have incidentally expressed the opinion. in which all men who have been long connected with the administration of justice in these colonies will I believe concur, that the punishment of death is the one most, and frequently the only one, dreaded by criminals. I beg your permission to add a few words separately on that point. The subject is painfully familiar to me. I have reflected on it for many years, commencing with my noviciate as Solicitor-General and afterwards Attorney-General, in the days of the convict system in Tasmania; and I have never I believe reported on any capital case as a judge in this colony without reviewing my opinions as to the continuing necessity, in certain classes of crime, for death punishments.

2. I assert as a fact within my own personal observation, that men under trial or commitment dread above all things the infliction of death. Criminals of all grades will plead guilty to almost any charge (sometimes hoping thereby to escape trial, or at any rate conviction for a capital offence) but never in my experience to one involving the sentence of death. But if sentenced to that dreaded fate, every effort is made by the unhappy criminal and his friends to avert it. The chief security for life at this hour, and for the female person, is the knowledge that death may be inflicted for the taking of life, for brutalities or wounding manifesting an intention to take life, and that for crime so lightly thought of by some, which to many women would be a cruelty greater than the deprivation of life.

3. Why then is it, that this penalty does not more and more restrain men from capital crimes; and that these do not eventually nearly disappear? There are many reasons. First, the general feeling against executions, arising partly from the dread lest by possibility some innocent man may be subjected to this irrevocable doom; partly from sympathy with the sufferer, in cases where strong provocation or temptation may (really or apparently) have induced the fatal deed; partly from the settled idea, in many minds, that it is wrong ever to inflict death as a punishment; partly from the reaction following on that bar-

barous and hateful code, which made the uttering of one forgery, the stealing of one horse or sheep, or the taking of five pounds worth of goods in a dwelling, equal in legal criminality with that of the ruffian who shoots at and cruelly wounds the victim for whose life he has thirsted, and regrets only to hear that the man survives.

4. Secondly, because proper means are not taken to allow the natural dread of death, inflicted violently for crime, to operate on the mind. On the contrary what with the interest, and publicity, and temptation to bravado or display, which I have commented on in my letter, and the attentions often shown to the condemned while under sentence (all of which things undoubtedly tend to demoralize still more those predisposed to crime), all deterrent effect otherwise to be expected from the example afforded by the punishment is lost.

5. Thirdly, the success which occasionally attends the strenuous efforts made, after sentence, often I believe regardless of the opinion of the Judge who has weighed well the facts, to save the criminal's life, efforts of unquestionably humane persons, but generally men of small experience and sometimes less reflection, who little think how many lives of innocent and helpless victims the sacrifice to justice of the one criminal might be the means of saving, how much of cruel or brutal outrage on the unoffending might be restrained by the warning afforded, and therefore on what side the balance of mercy lies. Few things can tend more to destroy the effect of retaining death in the list of penalties, or to defeat the very end of all human punishment than the uncertainty which, by commutations and the exercise with too great facility of the pardoning power, is made to attend all convictions for capital crimes. In this colony I have of late years seen little of this, but we hear of it elsewhere, and whenever the power is exercised, even with the recommendation of the Judge, unless satisfactory reasons for the mitigation be known and published, the dread which ought to be felt of a conviction for any capital crime is so far diminished.

6. The general result is that the punishment of death comes to be, by the criminally disposed, regarded rather as a threat, reserved for very rare and gross cases, but not meant ordinarily to be carried out, or which, even if announced in the sentence will probably after all by some means be averted. There is in addition the chance of escaping conviction, perhaps detection, or arrest. Under such circumstances a very strong temptation is not unnaturally yielded to by such persons.

7. There is in England a growing impression, it seems, that cases of murder only should be capital, if any. I submit that very many cases of intended and attempted murder, but in which the injured person lives, are worse in atrocity than the ordinary instances of actual murder. This crime varies in degrees of guilt, of wickedness, treachery, and cruelty, down to merely culpable carelessness, as much as manslaughter does; yet, for all alike, the one penalty of death is provided. Surely this is to confound all the essential distinctions of crime. A man who rides into a crowd with no homicidal design whatever, but with a horse which he knows to be given to kicking, and which kicks and kills the rider's own child, is guilty of murder. So is a workman who throws a brickbat into a street, which had he reflected at all he would have remembered was usually a thronged thoroughfare, if he thereby accidentally kills a passer by; murder simply, or technically so only, should not be punished capitally even in form; and there would be no insuperable difficulty in distinguishing such instances by enactment from a murder by lying in wait, or murder accompanied by cruelty, or in the prosecution of some other serious crime, as robbery or rape, or with intent actually to kill or violently injure the person killed, or to prevent the slayer's lawful apprehension, or that of some other party, or afterwards to commit robbery or the like, though not actually in the course of prosecuting such crime. In some of the recent American codes I believe that murder has been in its degrees thus or similarly discriminated, and that punishments are assigned accordingly.

8. It is true that judges may by merely "recording" the sentence of death, immediately after the verdict, mark the wide distinction between a gross case of murder, and one calling only for a comparatively mild punishment. But the only legal sentence after all is to death, and I hold this system to be every way objectionable.

9. I go further and say that, in my humble judgment, this sentence of death, remembering how solemn a thing it is, should never be pronounced, even though the evidence has been such as to justify the verdict, and however gross the circumstances of the murder, if the judge himself entertains a scintilla of a doubt as to the prisoner's guilt. The public should be aware that there is a responsibility in sentencing beyond that merely of carrying out in due form the legal result of the verdict. And I conceive that, after sentence is pronounced, the pardoning power should very rarely indeed be exercised, except in evidence of some new fact, the bad character, not known to the jury, of a material witness, or the like. A power should exist in the Judge, or some appellate body (to which he should report fully) of examining witnesses on oath in aid of any such suggestion. But no new trial should be tolerated; and the grounds of interference should be ascertained, stated, and promulgated.

10. It will not be supposed that I contemplate any such alteration in our Criminal Code as that which would leave the power to any jury of finding "extenuating circumstances." Nothing should be left to the jury but the duty of finding (in alleviation or aggravation) specific facts. And in this view the legal crime of murder might remain as it is defined now; but the punishment of death should not be entailed if facts appear in evidence, and are found by the jury, reducing the offence to the second or third class or degree by law in that behalf specified.

11. The mere fact however of the victim of great cruelty or violence escaping with life where that life has manifestly been intended to be taken, or has been wilfully put in danger, appears to me to present no reason whatever for the vast difference which the law of England now makes between cases of wounding with intent to kill, or with intent to prevent arrest, or violently injuring in any manner a person robbed or attempted to be robbed, and cases of murder. The accident of the wound being half an inch higher or lower, or of the patient's being of a strong or a weak constitution, nay, or of his surgical treatment being more or less skilful, or the weather favourable or unfavourable, will determine the result. But surely there is no difference in the guilt of the felon, and to make the act capital if the man dies, but punishable only by hard labour if he recovers, seems clearly to be a confounding of all real differences in crime. The test should be the degree of actual wickedness, such as reflecting men would at once recognise and comprehend, and not the result of the act, which is a matter beyond the perpetrator's control. Instances may easily be imagined, and your Excellency may remember three, recently tried before myself: the shooting of the two constables, Hosie and Middleton, the lying in wait for and wounding of the gold escort, and the treacherous shooting of the Bennua traveller on the Liverpool road.

12. In the first and last of these cases clearer proofs of murderous design on the part of the prisoner could hardly be imagined. In each instance the attempt had been renewed more than once, and very serious wounds been inflicted, and in the first-mentioned the men were shot while endeavouring to arrest a notorious armed robber. Yet that case by the present law of England would be punishable by penal servitude only. In a case tried before me the same week a labourer stabbed his comrade in a quarrel in sudden revenge for insulting words. The wound was not dangerous, but the patient went to his work too soon, and the injury became mortal. This, an act infinitely less atrocious than any of those first mentioned, was therefore murder, and punishable by death. But everybody knows beforehand that in such cases the punishment is not enforced, and thus its enunciation becomes practically a farce. The public see that in many cases the holding out of capital punishment as a threat is a threat merely, and the law, to that extent at all events, is despised accordingly.

13. I take the opportunity of adding that I agree with Mr. Justice Wise in opinion that no executed malefactor should be delivered up. An inspection of the body by the friends and relatives should, for obvious reasons, be permitted; but advantage may be taken of the possession of the body to make a procession and display, assuming the character of a party triumph and open contempt of the law.

14. The subject of capital punishment cannot adequately be discussed in a letter; and I have sought only to offer a few suggestions founded on personal experience respecting it, which possibly your Excellency will think may be of use elsewhere. But when it is proposed to abolish wholly the penalty of death

for crime, it becomes necessary to consider whether the cause of humanity will really be advanced by the measure. And if perpetual imprisonment be substituted, or servitude for a term probably equivalent to a lifetime (in the actual infliction of which I am no believer, even in the gravest cases) what will be left to restrain the more daring or hardened from further murders, or murderous assaults on keepers for instance? Is it not the fact, moreover, that the crime of rape increased above one-third, in some years one-half, for years after the penalty of death had been removed from it? And, if the non-increase of bank note forgeries, after mitigation, in the code be relied on by abolitionists, is it not the fact that this was the result partly of increased difficulty, mechanically, in producing the imitation, and partly of the increased quantity of the metallic circulation? These, however, are points which I am less competent to deal with, and my communication is already too long.

I have, &c.
(Signed) Alfred Stephen.

VICTORIA.

Governor Sir C. Darling to Mr. Cardwell.

Sir, Government House, Victoria, August 22, 1864.

Having duly received the Secretary of State's Circular Despatch of the 24th March last, expressing the desire of Her Majesty's Government to be informed whether the execution of criminals is in this colony conducted within the walls of the gaol, and if so, whether (1.) The public at large are quite satisfied that the sentence of the law is in all such cases as fully and completely enforced as if the execution had taken place outside the gaol? and (2) whether in my opinion and that of those who have the best means of knowing the moral effect of such punishment, the penalty of death is found to be less deterrent in consequence of its being inflicted in a comparatively private manner?

I have now the honor to forward herewith the following documents, viz.

1. Copy of a Report upon the points referred to from the Minister of Justice and the Attorney General, dated 23rd May 1864.
2. Copy of a letter from the Sheriff, dated 1st June 1864.
3. Copy of a letter from the Inspector General of Penal Establishments, dated 7th June 1864.
4. Copy of a letter from the Chief Commissioner of Police expressive of the views entertained upon the subject by those several functionaries.

From these documents it will be perceived, that it is the practice in this colony to conduct the execution of criminals within the walls of the gaol; and that it is the opinion of those gentlemen in public office, who may be assumed to possess, both of themselves and through their subordinates, fair means of judging of the effects of this system, both upon the public at large and the unfortunate sufferers themselves, that it is preferable in both respects to the system of carrying out a capital sentence in the presence of a large number of spectators.

I have only to add that my own experience has long been in favor of the less public mode of execution; and that the result of my local inquiries, and of my further consideration of the subject since I received the despatch to which I have now the honor of replying, has tended to confirm me in that opinion.

I have, &c.
The Right Hon. E. Cardwell, M.P. (Signed) C. H. Darling.
&c. &c. &c.

Report of the Minister of Justice and Attorney-General.

Crown Law Offices, Melbourne, May 23, 1864.

The Minister of Justice and Attorney General have the honor to acknowledge the receipt of a Circular, dated March 24, 1864, forwarded by the authority of the Secretary of State, relative to the execution of criminals in public, which has been referred to them by His Excellency.

In reply to the questions contained in the Circular, the Minister of Justice and the Attorney General have the honor to inform the Governor:—

1st. That in their opinion, the public at large are quite satisfied that the sentence of the law is in all cases of capital punishment as fully and completely enforced as if the executions had taken place outside the gaol. A copy of the Act in force in Victoria relating to the execution of criminals is enclosed, by which it will be seen that effectual means are provided of informing the public of the due execution of the sentence.

2. That in their opinion the penalty of death is found to be not less deterrent in consequence of its being inflicted in a comparatively private manner.

The Minister of Justice and Attorney General beg leave to suggest that the Sheriff and the Inspector General of Penal Establishments would be able to furnish His Excellency with valuable opinions and information respecting the operation of the law of Victoria upon the subject.

(Signed) A. Mechie,
Minister of Justice.

(Signed) Geo. Higinbotham.
Attorney General.

The Act regulating the Execution of Criminals, referred to in the report of the Minister of Justice and Attorney General, dated 23d November 1854, is in the same words as that of New South Wales (Sydney), with the additional section which alone is reprinted.

Sect. IV. "The body of any person on whom the sentence of death shall "have been carried into execution as aforesaid, shall not be buried or removed "from the gaol where such execution is had, within eight hours next after "such execution, and every person who shall, within that time, produce to "the gaoler of such gaol an order from any Justice of the Peace of the said "Colony requesting such gaoler to admit the bearer of such order to view the "body of such person, shall and may be admitted by such gaoler accordingly."

Mr. Farie to the Colonial Secretary.

Sir, Sheriff's Office, Melbourne, June 1, 1864.

I have the honor to acknowledge the receipt of your letter of the 27th ult., enclosing a copy of a despatch received by his Excellency the Governor from the Secretary of State, relating to the private execution of criminals within the walls of the gaol; and requesting me to furnish any information in my power, and my own opinion on the two points referred to by the Secretary of State.

With reference to the first point: I have no doubt that the public at large are perfectly satisfied that the sentences are as effectually enforced as if they had been carried into execution outside the gaol; at all events, I have never heard any doubt expressed on the subject, and I think the precautions prescribed by the Act, viz.: the certificates of the medical officer, of myself, and other witnesses, together with the coroner's inquest must completely satisfy even the most sceptical.

The second point alluded to by the Secretary of State may, perhaps, admit of more doubt and difference of opinion; but, I have no hesitation in asserting my opinion that the penalty of death is not found in any way less deterrent in consequence of its being inflicted in a comparatively private manner; and, in so far as the criminal himself is concerned during the period between his condemnation and the execution, I am perfectly satisfied of the beneficial influence, which the private system as compared with the public, exercises over his feelings and behaviour during the last few days of his life, and more especially on the scaffold, immediately prior to the execution. Under the public system it was not unusual to see men who had been convicted on the most incontestable evidence of the most heinous offences known to the law, continuing to display an utter indifference to their fate, and this, I believe, merely from a feeling of bravado, so as not to appear afraid when exposed on the

scaffold to the gaze of many of their old companions in crime. Under the private system such a feeling is very rarely exhibited, which I cannot but consider as conducive to the eternal welfare of the unhappy criminal himself, and cannot be less deterrent than the system which often exhibited the unhappy men in their last moments to the delighted gaze of their former associates, who used to crowd round the gallows to see if their old friends would "*die game,*" as they in their admiration expressed it.

I have, &c.
(Signed) CLAUD FARIE, Sheriff.

Mr. CHAMP to the COLONIAL SECRETARY.

Penal Department, Inspector General's Office.
SIR, Melbourne, June 7, 1864.

I HAVE the honor to acknowledge the receipt of your letter of the 27th ult., enclosing copy of a despatch received by his Excellency the Governor from the Secretary of State, respecting the effect resulting from the execution of criminals within the walls of the gaol, and requesting my opinion and any information I might be able to afford on the two points referred to by the Secretary of State.

In reply, I have to inform you that since the receipt of the letter in question I have made enquiry and cannot find that the subject has excited the attention of any one; all that I am enabled to say is, that there appears to be no reason whatever to doubt that the public are perfectly satisfied that, in cases of private execution, the sentences are as fully carried out as if the punishment had been inflicted outside the gaol. Neither, so far as I can learn, is there any ground for supposing that the moral effect of the penalty of death is less deterring from being privately inflicted. I may add that I have caused enquiries to be made among the convicts at Pentridge, and am informed that not one of them seems to have bestowed a thought upon the subject.

I have, &c.
(Signed) W. T. N. CHAMP, Inspector General, P. E.

From the CHIEF COMMISSIONER of POLICE.

Police Department, Chief Commissioner's Office,
SIR, Melbourne, June 17, 1864.

I HAVE the honor to acknowlege the receipt of your letter of 27th May forwarding a copy of a letter from the Secretary of State for the Colonies, and requesting my opinion on the points raised respecting the effect resulting from the private execution of criminals.

With reference to the first of the two points referred to I do myself the honor to inform you that in the case of executions in this Colony a limited number of the public are admitted within the walls of the gaols to witness executions. An inquest is afterwards held by the coroner on the body of the condemned, and the proceedings are thrice published in the Government Gazette in accordance with the requirement of 27 Vict., No. 233, sect. 314.

The sheriff, however, will be better able than I am to give information as to the course pursued in carrying the last penalty of the law into effect.

There can, I think, be no doubt that the public in Victoria are fully satisfied that the sentence of the law in these cases is as fully and completely enforced as if the executions had taken place publicly outside the gaol; indeed, taking into consideration the provisions of the law respecting private executions it is difficult to see what possible cause there can be for doubt on this point.

As to the moral effect of private executions upon the criminal class I called upon the officer in charge of detectives for his view, as from his experience with the criminal class he is well able to form a judgment on the subject, and I have been informed by him that the moral effect of private executions, upon the criminal class appears to be greater and more beneficial than that of public executions.

In this view I fully concur, as I do also in Superintendent Nicolson's further remarks, that the spectacle at a public execution of an offender meeting the extreme penalty of the law with bravado or fortitude, or even with apparent indifference, unquestionably weakens the fear of capital punishment in the minds of the younger portion of the criminal class. The solemnity of the condition of the condemned is much more impressed upon him and his companions in crime by the consideration, that on his withdrawal from the dock, after sentence of death is pronounced upon him, he disappears from public view *for ever*. The mind of the criminal is not diverted from the contemplation of his approaching end by the prospect of recognizing his associates once more from the public scaffold, or by endeavours to demean himself well before them. On the contrary he knows that when he dies he will be surrounded by a few officials and others who will feel no sympathy either for him, his crime, or his class. He is, therefore, deprived of a strong incentive to anything like improper demeanour on the scaffold, and his associates outside are deprived of a most demoralizing spectacle.

The particulars of the execution which duly reach them through the columns of the public press are also calculated to have a salutary effect.

The benefit of the example of private, as compared with public executions, is mostly experienced by the younger portion of the criminal class, who are generally less thoughtful and more reckless than their seniors; the latter are for the most part more careful in their doings to avoid acts which may bring capital punishment upon them.

I am informed by those who have good opportunities of knowing, that the criminal class have a greater dread of death on a private than on a public scaffold; and I am further given to understand that at private executions the condemned almost invariably appears suitably impressed with his awful position, and very seldom exhibits that spirit of levity and bravado which is not unfrequently displayed by culprits on a public scaffold.

I have no doubt that the sheriff will be able to give more full and satisfactory evidence to the same effect.

I have, &c.

Frederick C. Standish,
Chief Commissioner.

SCOTLAND.

Sir Edinburgh, September 21, 1864.

I have had prepared for the use of the Punishment of Death Commission, the accompanying table of crimes still capitally punishable in Scotland.

It is necessary however to explain that as the whole duty of prosecuting for crimes in Scotland devolves on the Lord Advocate as Public Prosecutor, he has the power in each case, by himself or the Depute-Advocate acting for him, of restricting the libel or indictment to an arbitrary or discretionary punishment; by which form a capital sentence is avoided practically in all cases which are not punishable capitally in England.

There is, in my opinion, no object to be gained in retaining this large list in the statute book, although in practice no inconvenience can be said to result from it. I believe the law in this respect would have been altered sooner, but for doubts entertained regarding the punishment of the crime of rape, which still remains capital in Scotland, and it was thought in some quarters undesirable to surrender the power of so dealing with it.

I have, &c.

J. H. Patteson, Esq. J. Moncrieff.

List of Crimes now punishable with Death in Scotland, either at Common Law or by Special Statute.

1. *Murder.*—Capital at Common Law, actor or accessory before the fact.
2. *Importation of poisons into Scotland.*—Capital by 1450, cc. 31 & 32.

3. *Attempt to Murder.*—Assault with intent to kill a clergyman; also an attempt to rob his house. By 1670, c. 4. In certain cases is made capital by 10 Geo. 4. c. 38. (repealing 6 Geo. 4. c. 126.)

(s. 2.) *a.* Discharging loaded fire-arms.
b. Cutting or stabbing *with intent* to murder, maim, or disfigure.
c. Administering poison *with intent* to murder, disable, or do grievous bodily harm.
d. Suffocating, strangling, or drowning *with intent* to murder, disable, or do grievous bodily harm.

(s. 3.) Throwing sulphuric acid with intent to murder or disfigure, disable, or do grievous bodily harm.

4. *Rape.*—Capital at Common Law.

5. *Hamesucken.*—Capital at Common Law in aggravated cases where the injury is serious. (See Hume 1, 312, Steele 110.)

6. *Cursing or beating parents.*—Capital for any child above 16 years of age not being distracted, by 1661, c. 20.

7. *Invading Judges, &c.*—By 1593, c. 177. it is made capital to strike or hurt any Judge while sitting in judgment. Also to strike or hurt any person in the presence of the King's justice sitting in judgment, or within the palace when his Highness is residing there. And by 1600, c. 4. invading or pursuing his Highness's session or officers on account of the performance of their duty.

8. *Robbery or Stouthrief.*—Capital at Common Law.

9. *Theft.*—Aggravated cases of theft are punishable at Common Law, where the crime taken in all its bearings amounts to a *furtum grave.* (1 Hume 87.) *e. g.* Theft by housebreaking; Theft by one habit and repute a thief; Theft * of more than one sheep; Theft * of a horse or ox; Three acts of thefts proved at once; Child stealing. And by Statute 18 Geo. 2. c. 27. s. 1. stealing linen, &c. to the value of 10*s.* from a bleaching green: s. 2. Judge has discretionary power of sentencing to 14 years penal servitude.

10. *Theft-bote.*—The taking rewards from a thief by justices, sheriffs, or private individuals for sheltering him from justice is made capital by 1515, c. 2. and 1436, c. 137. Obsolete, see 1 Hume, 412.

11. *Wilful Fire-raising.*—Capital by statute, 1525, c. 10., 1540, c. 38., especially in cases of burning corn in stacks, or barns. Pains of treason inflicted by, 1526, c. 10., 1567, c. 39., in cases of burning houses, folks in their houses, and corn; 1592, c. 148, burning of coal-heughs. Pains of treason removed, and capital punishment substituted by, 7 Ann c. 21. Punishment extended, by 1 Geo. 1., stat. 2. c. 48. s. 4., to burning of woods, coppices, underwoods, &c., maliciously. 7 Will. 4. & 1 Vict. c. 89. does not extend to s. 1.

12. *Killing or houghing of oxen, horses, and other cattle.*—Slayers and houghers of oxen, and the receivers, suppliers and maintainers of such slayers, &c., punishable capitally, 1581, c. 110.

13. *Cutting growing trees, or corn, &c.*—Pains extended by 1587, c. 83. to those who cut growing trees and corn, and to "breakers of inclues, or stickers, "gorares, and sellares of oxen or horses in time of leading of cornes or "fewall."

14. *Incest.*—Capital by 1567, c. 14.

15. *Bestiality and sodomy.*—Capital at Common Law.

16. *Notour adultery.*—Capital by 1563, c. 74, (in desuetude).

17. *Sorning.*—Capital by 1455, c. 45, (obsolete?) Punishment was seldom inflicted for sorning alone.

18. *Vagabonds deserting a second time from the masters to whom the magistrates have bound them.*—By 1579, c. 74. Obsolete.

19. *Piracy.*—Capital; Court of Justiciary the competent Court.

20. *Scuttling, casting away, burning or destroying any ship or directing the same to be done in order to prejudice the owners of vessel, owners of goods on*

Note.—Some of the Statutes mentioned in the list are obsolete or in desuetude, but it has been thought advisable to insert them as they have not been specially repealed.

* Said to be capital by Statute, but Statute not specified. Ross's Bell's Dict. *voce* Theft.

board, or underwriters of insurances.—Capital in Scotland by 29 Geo. 3. c. 46.; extended by 43 Geo. 3. c. 113. s. 2.

21. *Treason.*—The Scotch law of treason was assimilated to the English by 7 Anne c. 21. At Common Law, 2 Hume 34.

22. *Mutiny.*—Regulated by the annual act.*

23. *Mobbing and rioting.*—Pulling down any church or place of religious worship tolerated by law where the King and Prince of Wales are prayed for. Capital by 1 Geo. 1. stat. 2. c. 5. ss. 4, 9, 10. Capital punishment for other offences mentioned in this Act abolished by 7 Will. 4. & 1 Vict. c. 91.

24. *Hearing mass and concealing the same.*—By 1594, c. 196, 1607, c. 2, and 1661, c. 8. (In desuetude.)

25. *Jesuits, priests, and trafficking papists saying mass.*—By 1661 c. 8. (In desuetude.)

26. *Engaging in a duel without his Highness's licence.*—By 1600, c. 12.

27. *Breaking into a shop or house with intent to cut or destroy woollen goods on the loom, tools employed, racks, &c., without consent of the owner.*—By 29 Geo. 2. c. 46. s. 2.

§ 3. Also with intent to destroy velvet, &c.

§ 4. Also with intent to destroy linen, &c.

Crimes in regard to which Capital Punishment has been recently abolished.

Crimes.	By what Statute abolished.
Concealment of pregnancy, where child dead or missing.	49 Geo. 3. c. 14.
Post office offences - - -	1 Vict. c. 32. and 7 Will. 4. & 1 Vict. c. 36.
Forgery - - - -	2 & 3 Will. 4. c. 123. s. 1., 5 & 6 Will. 4. c. 73., and 7 Will. 4. & 1 Vict. c. 84. s. 1.
Mobbing and rioting; assisting murderer to escape; seducing Her Majesty's servants; administering oaths with a view to incite to felony; prison-breaking; slave-dealing; smuggling.	(The offences mentioned in ss. 1 & 5 of 1 Geo. 1. stat. 2. c. 5.) 7 Will. 4. & 1 Vict. c. 91.
Letter-stealing; sacrilege -	5 & 6 Will. 4. c. 81.
Returning from transportation -	4 & 5 Will. 4. c. 67.
Blasphemy, sedition, and leasing making.	6 Geo. 4. c. 47., and 7 Will. 4. c. 5.

Restriction of the Pains of Law.

As it is in the power of the public prosecutor either to insist in or depart from any prosecution, so he has it also in his power after he has brought his libel into court, and even after a verdict has been returned, to depart from a capital charge and insist in a minor one, or to restrict the pains of law to an arbitrary punishment.

In the case of offences punishable capitally *at common law* there exists no doubt of this power in the prosecutor.

A slight doubt has been raised in the case of statutory crimes by the fact that in one statute, 6 Geo. 4. c. 126. (the Maiming Act), it is specially provided (s. 2.), "that nothing contained in this or any other statute enacting a "capital punishment shall be held to affect the power of the prosecutor to "restrict the pains of law." From this it has been sometimes inferred, that in those British statutes inflicting capital punishment where no permission is given to the prosecutor to restrict the pains of law he is barred from doing so. But this inference would appear to be quite erroneous, *first*, because from the very words of the statute it is plain that the existing power of the prosecutor is admitted, and it is specially provided that no distinction shall be introduced in the case of statutory crimes.

* This crime, though usually dealt with by military authorities, is believed to be cognizable by the Court of Session.

Secondly. It is the practice now to restrict the pains of law, without distinction between crimes capital at common law and by statute. And this has been repeatedly done in the case of crimes which, though punishable capitally, are not now visited with death, *e. g.*, the graver thefts, beating and cursing of parents, &c.

73, Great King Street, Edinburgh,
November 24, 1864.

SIR,

WITH reference to the Circular Letter of date 25th July last, addressed by you to the several Judges of the Supreme Criminal Court in Scotland, I take leave to enclose for the information of the Commissioners appointed to inquire into the matter of Capital Punishment, a statement subscribed by all my brethren as well as myself expressing our opinion on the points to which we understand the request contained in your letter to be directed.

I am, &c.

DUNCAN MCNEILL,
Lord Justice General.

J. H. Patteson, Esq., Secretary.

NOTE by the LORD JUSTICE GENERAL, the LORD JUSTICE CLERK, and the LORDS COMMISSIONERS OF JUSTICIARY.

IN the letter addressed to each of us by the Secretary of the "Capital Punishment Commission," we are requested to furnish the Commissioners with a statement of our opinions "as to the efficacy of the laws at present in force "relative to Capital Punishment."

These laws, in so far as applicable to Scotland, amount in substance to this, that for certain offences the punishment of death is or may be awarded, and that when sentence of death has been pronounced it must be carried into execution publicly unless, by exercise of the Royal Prerogative, the criminal has been pardoned, or the Capital Punishment has been commuted for some punishment short of death. But it may be proper to explain that in the matter of prosecution for crime in Scotland, the Lord Advocate, as public prosecutor, represents the interest of the Crown and of the public, and that in practice all offences to which the law has attached the punishment of death are prosecuted at his instance, and the prosecutions are conducted by him in person or by deputies appointed by him acting under his direction and authority. If in any case it appears to the public prosecutor that the circumstances are not such as to require the infliction of Capital Punishment, he can of his own act by a minute entered on the record at any stage of the trial, before sentence, restrict the pains of law to what is termed an "arbitrary" punishment, *i.e.*, a punishment *in arbitrium judicis*, but short of death. For a long time this course of restricting the pains of law has, except in cases of extraordinary aggravation such as rarely occur, been followed invariably in regard to all those offences other than murder in which Capital Punishment is sanctioned by law. One effect of the flexibility thus given to the law in Scotland is that few sentences of death are pronounced which are not carried into execution, and it is perhaps in some degree owing to the same cause that there is, so far as we have observed, no defeat of justice by reason of aversion on the part of juries to the consequences of convicting. We see no reason to apprehend that the power thus vested in the Lord Advocate as the responsible officer of the Crown exercised in open court and under the check of public opinion will be exercised capriciously or be in any way abused, and we have never known it to be so.

The great object of Capital Punishment is not so much to get rid of an offender dangerous to the community, for that end might probably be attained by other means, as to deter others from committing the like crimes. It is vain, however, to expect that as human nature is constituted crime will be altogether prevented by any kind of punishment that has been contrived or can be suggested; all that can be expected from punishment is that it shall operate as a powerful deterrent from crime, and the more it operates as a deterrent the greater is its efficacy. In that view we are of opinion that there is much efficacy in the laws at present in force relating to Capital Punishment as administered in this part of the United Kingdom.

But this does not exhaust the matter as to which we suppose our opinions are desired; assuming the general efficacy of Capital Punishment as deterring

from crime, it may still not be in all circumstances the best deterrent, or it may be so applied as to be productive of evils to the community more than counterbalancing the benefits which the community derive from it.

The protection of the person and property of the members of the community is the end aimed at by the infliction of punishment. But as the injuries caused by the perpetration of some crimes are greater and more to be dreaded than those caused by the perpetration of other crimes, all civilized communities have acted on the feeling that the measure of punishment should bear some proportion to the nature and magnitude of the offence. In most communities wilful murder has been regarded as the crime of greatest magnitude, most to be dreaded, and most anxiously to be repressed, and it has been almost always punished with death as being the punishment most dreaded by such offenders, and most calculated to deter from the commission of the crime.

We are of opinion that, as regards the crime of wilful murder, Capital Punishment ought not to be abolished. We think that to the minds of the great majority of the class of persons most likely to commit murder the punishment of death has more of terror, and is more efficacious as a restraint than any other punishment less severe would be; and we do not suppose that the substitution or suggestion of a punishment that would be more dreaded because more unbearable, and therefore more severe and consequently less humane is desiderated. It does not appear to us that to continue the infliction of Capital Punishment in cases of wilful murder will be detrimental to the community either in an economical or in a moral point of view. Nor do we think it would be for the interests of humanity that the well conducted and useful members of the community should be more exposed to deprivation of life by murder in order that the lives of the murderers may be saved. A leading argument for the abolition of Capital Punishment in regard to all offences except murder has been the inducement thereby held out to offenders to spare life, and especially the lives of those likely to give evidence against them; but the inducement would cease with the cessation of Capital Punishment for murder.

Whether the law ought to sanction Capital Punishment in any case other than that of wilful murder is a separate and more difficult question. We do not know enough of the effect in England and Ireland of recent legislation on this subject to enable us to derive any light from that source. In Scotland, owing to the system of criminal prosecution already explained, very nearly the same condition of matters has long ago been practically reached without legislation, and sentence of death has in modern times rarely, if at all, been pronounced in any case in which the feeling of the community has been opposed to the execution of the sentence on the ground of its unsuitableness to the offence. But we think that a knowledge of the existence of a power to inflict Capital Punishment has a powerful effect in deterring from the perpetration of offences accompanied by circumstances of cruelty and atrocity perhaps more terrible to the victims than death. We do not, however, doubt that the entire abolition of Capital Punishment in England and Ireland in regard to certain offences will have its due effect on the administration of the law in Scotland in regard to the like offences even without any direct intervention of the legislature.

As to the mode of carrying into execution sentences of death we are of opinion that the execution should be in public rather than in private. Considerations present themselves on either side of that question, but we think that those in favour of public execution ought to prevail.

The remission of sentences of death is one of the highest prerogatives of the Crown, and the propriety of the exercise of it in any case ought not to be questioned lightly or upon grounds merely conjectural. At the same time it cannot be denied that the efficacy of capital sentences and executions as preventatives of crime must be impaired if there comes to be great uncertainty as to whether such sentences solemnly pronounced will be actually carried into execution. Respect for the verdicts of juries and confidence in trial by jury must be endangered if the decisions of sworn jurymen on the import of sworn evidence, and approved of by the judge who tried the case are reviewed and set aside by reason of mere doubts entertained in other quarters or of testimony tendered or collected of a kind less reliable than the evidence on which the

verdict proceeded. The certainty with which punishment follows conviction and sentence is an important element in the successful administration of criminal law.

We do not understand that the law of treason is involved in this inquiry.

If our opinions are desired on any other points we suggest as the most convenient course that such points should be embodied in queries which we may consider, and may answer either collectively or individually.

DUNCAN MCNEILL, Lord Justice General.
JOHN INGLIS, Lord Justice Clerk.
JOHN COWAN.
GEO. DEAS.
JAS. CRAWFURD.
CHARLES NEAVES.
CHARLES BAILLIE.

Edinburgh, November 23, 1864.

STATEMENT of the Number of Persons in Scotland Sentenced to Death for Murder; of the Total Number Sentenced to Death; of the Number executed for Murder; and of the Total Number Executed, in each year since 1823 inclusive, with the Average of the Numbers for each period of ten years 1823–32, 1833–42, 1843–52, 1853–62; and the Numbers for 1863, with the proportion of the Average Numbers to the Population for each period of ten years.

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1823	5	32	4	18
1824	3	15	2	6
1825	1	9	1	2
1826	*4	15	2	8
1827	3	14	3	5
1828	3	8	2	4
1829	3	9	3	6
1830	6	8	6	8
1831	11	16	10	14
1832	4	6	2	3
Average of the 10 Years	4·3	13·2	3·5	7·4
Proportion of average to Population	one in 518,128	one in 168,784	one in 636,558	one in 301,075
1833	4	9	2	4
1834	3	5	2	3
1835	5	6	4	5
1836	2	2	1	1
1837	3	3	2	2
1838	3	3	1	1
1839	2	2	1	1
1840	3	3	2	2
1841	4	5	2	2
1842	—	—	—	—
Average of the 10 Years	2·9	3·8	1·7	2·1
Proportion of the average to Population	one in 859,408	one in 655,864	one in 1,466,050	one in 1,186,802

* One of the persons sentenced to death for murder this year committed suicide in prison.

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1843	2	2	2	2
1844	1	1	1	1
1845	—	—	—	—
1846	—	—	—	—
1847	2	2	1	1
1848	3	4	2	2
1849	5	5	4	4
1850	3	3	2	2
1851	1	1	1	1
1852	4	4	3	3
Average of the 10 Years	2·1	2·2	1·6	1·6
Proportion of the average to Population	one in 1,311,650	one in 1,252,028	one in 1,721,540	one in 1,721,540
1853	9	9	4	4
1854	1	1	1	1
1855	2	2	1	1
1856	3	3	—	—
1857	3	3	3	3
1858	—	—	—	—
1859	—	—	—	—
1860	5	5	1	1
1861	3	3	—	—
1862	2	2	1	1
Average of the 10 Years	2·8	2·8	1·1	1·1
Proportion of the average to Population	one in 1,062,685	one in 1,062,685	one in 2,705,016	one in 2,705,016
1863	1	1	—	—

N.B.—The proportion of population is calculated on the mean numbers of two Censuses for each period; 1821 and 1831, 1831 and 1841, 1841 and 1851, 1851 and 1861.

No person known to be a foreigner has been convicted of murder during the period embraced in this return.

And. Murray, jun.,
Crown Agent.

Crown Office, Edinburgh,
16th March 1865.

IRELAND.

In the year 1832 Capital Punishment was abolished in Ireland for cattle stealing, horse stealing, sheep stealing, larceny to the value of 5*l.* in a dwelling house, coining, and forgery (except of wills and powers of attorney to transfer stock). The numbers of capital sentences in the years 1832 and 1833 were respectively 319 and 237.

It was further abolished in 1833, for housebreaking; in 1835, for sacrilege and letter stealing by servants of the Post Office; and in 1837 for the rescue of convicted murderers, the seducing of soldiers and sailors, and those forgeries which had been excepted in the Act of 1832. The average number of capital sentences from 1838 to 1842 inclusive fell to 42·6.

In 1837 (1 Vict.) the offences subject to Capital Punishment in Ireland had virtually been reduced to the following, viz.:—Murder; attempts, conspiracy, and solicitation to murder; rape, and carnal abuse of children; unnatural offences; burglary with violence to persons, and robbery attended with cutting

or wounding; and arson of dwelling houses, endangering the lives of inmates. It remained also for treason; piracy, where murder was attempted or life was endangered; abduction of women; casting away ships, and showing false signals to cause shipwreck; maiming cattle; destruction of buildings under certain circumstances, certain classes of tumultuous assemblies, and the forcible seizure of arms; prison breach, returning from transportation before the term of sentence had expired, and harbouring the principal offenders; celebration of certain illegal marriages; and embezzlement by servants of the Bank of Ireland. But these latter offences were of rare occurrence.

In 1842 it was abolished for rape, &c., abduction, and most of the other offences lastly enumerated. The average number of capital sentences during the following years, from 1843 to 1861, fell, notwithstanding the large number (60) in 1848, to 14.

Under the Consolidation Acts of 1861 treason and murder may practically be regarded as the only crimes subject to Capital Punishment in Ireland; no conviction under 1 Vict. c. 88. s. 2. for piracy (where murder is attempted or life is endangered) having taken place since that Act was passed. The capital sentences in the years 1862 and 1863 have been respectively 6 and 4; of the last, 1 was on conviction as accessory to murder before the fact.

Dublin Castle, 22nd December 1864.

IRELAND.

STATEMENT of the Number of Persons Sentenced to Death for Murder; of the Total Number Sentenced to Death; of the Number Executed for Murder; of the Total Number Executed, in each year since 1823, inclusive; with the Average of the Numbers for each period of ten years, 1823–32, 1833–42, 1843–52, 1853–62, and the Numbers for 1863, with the proportion of the Average Numbers to the Population for each period of ten years.

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1823	21	241	18	61
1824	49	295	41	60
1825	17	181	9	18
1826	28	281	17	34
1827	22	346	12	37
1828	33	211	16	21
1829	28	224	21	38
1830	28	262	14	39
1831	27	307	25	37
1832	19	319	17	39
Average of the 10 Years	27·2	266·7	19·0	38·4
Proportion of average to Population	one in 267,816	one in 27,313	one in 383,400	one in 189,703
1833	38	237	26	39
1834	49	197	31	43
1835	31	179	19	27
1836	22	175	12	14
1837	21	154	10	10
1838	8	39	3	3
1839	30	66	15	17
1840	15	43	—	—
1841	17	40	5	5
1842	11	25	4	4
Average of the 10 Years	24·2	115·5	12·5	16·2
Proportion of average to Population	one in 329,390	one in 69,015	one in 637,700	one in 492,053

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1843 - - -	12	16	4	5
1844 - - -	19	20	8	9
1845 - - -	9	13	3	3
1846 - - -	9	14	4	7
1847 - - -	23	25	8	18
1848 - - -	44	60	24	28
1849 - - -	—	1	—	—
1850 - - -	15	17	8	8
1851 - - -	11	17	2	2
1852 - - -	14	22	3	6
Average of the 10 Years -	15·6	20·5	6·4	8·6
Proportion of average to Population - -	one in 472,035	one in 359,207	one in 1,150,586	one in 856,250
1853 - - -	13	15	7	9
1854 - - -	4	6	3	4
1855 - - -	4	5	—	—
1856 - - -	6	8	2	3
1857 - - -	5	8	—	—
1858 - - -	5	8	4	4
1859 - - -	2	2	—	—
1860 - - -	5	7	2	2
1861 - - -	1	2	1	1
1862 - - -	6	6	4	4
Average of the 10 years -	5·1	6·7	2·3	2·7
Proportion of average to Population - -	one in 1,210,916	one in 921,742	one in 2,685,076	one in 2,287,287
1863 - - -	3	4	3	4

N.B.—The Proportion to Population is calculated on the mean numbers of two Censuses for each period ; 1821 and 1831, 1831 and 1841, 1841 and 1851, 1851 and 1861.

ANSWER of CHIEF JUSTICE LEFROY.

SIR, Leeson Street, 20th December 1864.

I HAVE considered with much attention the subjects referred to by your letter of the 25th July. It has been a source of great satisfaction to me that the cases in which the Punishment of Death is now inflicted are considerably diminished, and I have a decided opinion that as Capital Punishment is now confined to cases of high treason and wilful murder, it would not be expedient further to abridge its infliction, but I cannot suggest any other mode of carrying out that sentence less liable to objection than that which now unavoidably attends its publicity. With respect to my attending to be examined, I beg to say it would be attended with great inconvenience, and I am not aware that I could add anything material to what I have stated.

I have the honour to be, Sir,

Your obedient servant,

THOS. LEFROY, C. J. J.

Answer of the Honourable Mr. Baron Fitzgerald.

Dublin, 50, Stephen's Green, East,
16th August 1864.

Sir,

I have the honour to acknowledge your letter of the 25th of July last, written by the direction of the Commissioners appointed to inquire into the provisions and operation of the laws under which Punishment of Death is now inflicted in the United Kingdom, and to report whether it is desirable to make any alteration therein.

In my humble judgment, Capital Punishment cannot be safely abolished in cases of treason and murder, and to the efficacy of Capital Punishment publicity seems to me essential.

The laws now in force relating to Capital Punishment seem to me sufficiently to provide for the punishment of both crimes and with as few injurious consequences as are consistent with publicity at all.

The subject has been so fully discussed, and the reasons on which my opinion is founded being among those most familiar, I should consider it an idle waste of time of the Commissioners to state those reasons or rather repeat them.

I have always felt great doubt whether Capital Punishment should ever have been abolished in the case of the crime of rape; but the cases of this crime so differ in circumstances and degree that I see great difficulty,—even if popular opinion rendered the restoration possible,—in restoring the punishment without leaving a discretion to the Judge, in itself very undesirable.

In the event of the Commissioners deciding to take oral evidence, I should be very desirous that my presence were dispensed with, as I feel that I could contribute nothing of any novelty to the important matters to be considered by them.

I have the honour to be
Your very obedient servant,
J. W. Fitzgerald.

J. H. Patteson, Esq.

Answer of the Honourable Mr. Baron Deasy.

Sir,

Abbeville, St. Doulough's, Co. Dublin.

On my return from circuit I found your letter of the 25th July; my absence on circuit and other circumstances prevented my answering it sooner. I beg you will assure the Commissioners of my anxiety to afford them every assistance in my power in the discharge of the important duty intrusted to them by Her Majesty, and my regret that that assistance is but small.

In answer to your first question, as to my opinion of the efficacy of the laws at present in force relating to Capital Punishment, I wish in the first instance to state that my position as a judge does not give me any greater or better means of forming an opinion upon that subject than those possessed by ordinary persons; I wish therefore to guard against the possibility of any undue importance being attached to that opinion in consequence of my being a judge, while I do not think I ought to withhold the expression of it when asked for by Her Majesty's Commissioners.

There is one class of murders from time to time unhappily occuring in Ireland, the commission of which I think Capital Punishment does not operate at all to prevent, I mean those murders which are popularly called agrarian, where the crime arises out of some dispute respecting the tenure of land, or some real or fancied injustice done by the owner of land to an occupier of it. In those cases the perpetrator of the crime relies (too often successfully) upon the sympathy of the peasantry to shield him from conviction, or to favour his escape, and the dread of death does not operate as an element to deter from the indulgence of the passion of revenge which prompts the commission of the crime; but the same observation of course would apply to any other punishment which might be substituted for that of death. How far it operates in other cases where different incitements tempt to the commission of the crime of murder, and where the same ground for hope of the impunity or escape does not exist, I am unable to express any opinion entitled to slightest weight, writing as I do in ignorance of the criminal statistics of those countries in which the punishment of death has been abolished as compared with those of the countries in which it has been retained. My impression is that the nature

of the punishment operates very little, if at all, in preventing the commission of the crime of murder, which is generally committed under the influence of some strong passion which prevents the contemplation of the consequences; at the same time I think there is a strong feeling among the people of these countries that for a life deliberately taken, the life of him who takes it is justly forfeited, and that the safety of society requires that the forfeiture should be exacted. I think also that that feeling tends to increase the horror of the crime in all cases where popular sympathy does not go with its perpetrator.

If the punishment of death is to be retained I do not think any change in the publicity of its execution is advisable. The absence of publicity would, I think, diminish the force of the example, if it have any; and in its absence it might be difficult to convince the lower classes that the sentence had really been carried out. In Ireland the minds of those classes are so prone to suspect the government and the law of partiality towards the classes above them, that if one of those classes were convicted of murder and sentenced to death, nothing but a public execution would make them believe that the culprit had not been allowed to escape with life. The same feeling may perhaps exist among the same classes in England, though probably not to the same extent. In Ireland the same injurious consequences which are said to follow from public executions in England do not exist. It has been my painful duty since my accession to the bench to pronounce sentence of death in seven cases, in four of which the sentence has been carried out, and in all those cases the demeanour of the crowd who filled the court house was such as to lead me to believe they were deeply impressed with the solemnity of the occasion; and, as far as report enables me to judge, the spectators who witnessed the execution of the sentences exhibited similar feelings. I do not remember any instance of impropriety or levity of demeanour being exhibited by the spectators of public execution in Ireland.

I think it advisable also to retain that part of the sentence which directs the burial of the body within the precincts of the gaol.

In Ireland there is a strong anxiety to be buried by and with the family and friends, and the prevention of such burial adds to the horror of death by the hand of the public executioner. In one case before me the unhappy culprit, when asked by the officer of the Court whether he had anything to say why sentence of death should not be passed, implored of me to allow his body to be given to his friends, and said that he was quite satisfied to die if that request was complied with. In addition to that, I think that in cases of executions for crimes, such as I have before referred to, where popular sympathy to some extent is felt for the perpetrator, the funeral might and would be made the occasion of a most unseemly and injurious display of that sympathy in which many would be reluctantly compelled to concur; and the remains of the culprit would be treated rather as those of a man who had died for the redress of some popular grievance, than those of one whose life had been justly forfeited to his country's laws.

With respect to the second question, whether I would be willing to be examined before the Commissioners, I beg to say that it would be very inconvenient to me to have to attend in London, and I would suggest the expediency of sending printed questions, to which written answers could be given.

I have the honour to be,
Sir,
Your obedient Servant,
R. Deasy.

J. H. Patteson, Esq.,
Secretary to the Punishment of
Death Commission.

Sir Rookfield, Wicklow, September 28, 1864.

While acknowledging the receipt of your letter of the 25th July last I have to apologize for leaving it unanswered until this time. It did not come to hand until my return from circuit; and then I did not think that a hasty reply was either necessary or desirable.

I feel unwilling to submit myself to an oral examination before the commissioners as to the efficacy of the laws relating to capital punishment; not because I have anything to withhold, or that I am not ready to do my utmost for promoting the general good, but because I would not be able to give, what might reasonably be expected on such an occasion, proofs of my statements by reference to facts within my own experience. I have preserved no record of matters occurring in my experience, either as a judge presiding in a criminal court, or as a barrister occasionally called on during a pretty long professional life to consider the subject.

I have marked the progress of legislation since the 7 & 8 Geo. 4. and rejoice to bear testimony to the great improvement that has taken place, not only with respect to the laws awarding the punishment of death, but to those which prescribe the manner of its infliction. On the former subject, while I entertain a very decided opinion that the punishment of death ought not to be abolished; I think we have not yet gone far enough in reducing the number of capital offences. Some persons object on scriptural grounds to the infliction of capital punishment at all. With every respect for those who hold that opinion, I do not feel much pressed by it. We have the clear authority of the Old Testament for it, and what is perhaps more to our present purpose, we have a reference made to the practice, first by our Saviour (John viii. 7), and afterwards by St. Paul (Acts xxv. 11); without anything being said by either against its lawfulness in the sight of God. And in the absence of all special prohibition, these matters go far to establish its legality.

Assuming then that it may be lawfully resorted to on fitting occasions; the next question is what are those occasions? It is needless to occupy time in condemnation of the shocking system, according to which human blood has flowed as water, under the sanction of legal tribunals; or in commenting on the brutalizing effect thus produced, not only on the lower class of our people, but even on the upper classes, and not excluding the judges themselves, whose too great familiarity with blood induced a hardening of the heart that influenced our feelings in many, if not all the relations of man with man.

But to return. My opinion is that capital punishment ought to be restricted to two cases; 1, high treason; 2, murder. And that, having regard to this punishment, the crime of murder should be held to have been committed only where there has been a taking of human life, of actual malice aforethought, and with deliberate intention to kill. As to the doctrine of *legal malice, e.g.* causing death undesignedly while committing or attempting to commit a felony; causing death by doing a dangerous act with gross negligence, but without a murderous intent; or killing an officer of justice, or person acting in his aid, merely in order to secure an escape from justice: cases like these may, I think, be adequately punished by dealing with them as manslaughter. I consider it very prejudicial to the public good that, after men have been convicted of capital crimes, the Executive, perceiving that the punishment cannot be carried out without doing violence to public opinion, interposes the prerogative of mercy between the crime and its punishment. Of late years that prerogative has, in my judgment, been too frequently called into action. It ought to be reserved for cases in which, by newly-discovered evidence or otherwise, the reason has been convinced that the sentence of the law ought not, by an administration of justice in mercy to be rigidly carried out.

On the latter subject, the mode of inflicting the punishment, so far as my own observation has gone, I believe that a month or so is the time usually allowed to intervene between the sentence and its execution. In the present improved state of intercommunication, this period would seem to be sufficient for putting forward and duly considering every argument in favour of the convict. But there could be no objection, if the solution of any legal question or other circumstance were to call for it, to afford a respite for a further fixed time, upon the authority of the Executive, and with the concurrence of the judge.

When the time of execution has arrived, how is it to be done? I answer, not in the present mode, by which great injury is done to society without any adequate countervailing advantage. Not one of the numerous spectators who crowd in front of the gallows to witness an execution is the better for what he has seen. Very many make that an occasion for the commission of other crimes, or are thereby prepared more readily for a future career of crime.

The hackneyed excuse as to the necessity for a public example is not sufficient to counteract the positive evil that is done.

But while denouncing the practice of public executions, I am equally against the private execution of the sentence; though that should be testified in the most solemn way, by persons called in as witnesses by the sheriff; and which is, I believe, the course in some other places where English law is the foundation of their jurisprudence. In Ireland I think such a practice would be peculiarly injurious. It would draw the sympathies of the survivors still more strongly with the criminal, and against the law, than, unfortunately for us, they are now found to be.

Could the sentence not be executed by or under the immediate superintendence of the sheriff *in* the gaol and in the presence of a mixed body of witnesses? After sentence has been passed, and down to the day of the execution, it might be allowable for the convict to name some ten or twelve persons who should be permitted to be present on his part, and who would be under such regulations as to prevent any possible interruption or serious disturbance of the proceedings. On the other side there should be in attendance the sheriff, sub-sheriff, clerk of the Crown, governor, and surgeon of the prison, and such other persons as might be willing to attend, and as the sheriff should approve. It appears to me that the law as to burial within the precincts of the prison should remain unaltered, save perhaps as to making that a part of the sentence. On no account should the body be given to the disposal of the convict's friends. As soon as the surgeon has, at the call of the sheriff, reported that the convict is dead, the body should be placed in a plain coffin and interred without further ceremony. After which an entry of the whole proceeding should be made in the Crown book by the clerk of the Crown, signed by him, and countersigned by the sheriff, governor, and surgeon.

Praying excuse for the length to which these observations have run,

I have, &c.

To J. H. Patteson, Esq., E. Hayes.
Secretary to the Capital Punishment Commission.

25, Langford Terrace, Monkstown, County Dublin,
Sir, October 12, 1864.

In reply to your letter requesting me to furnish the Commissioners, to whom you are acting as secretary, with a statement of my opinion "as to the "efficiency of the laws now in force relating to capital punishments," I beg leave to state that in my opinion the punishment of death cannot, at present, be abolished, nor am I aware of any case in which, at present, it could, with propriety, be reduced to any other punishment; but I am of opinion that a change should be made in the manner in which the punishment of death is inflicted.

The execution of a prisoner should be so public that no doubt could arise as to its having been carried into effect upon the person, and at the time and place mentioned in the sentence; but it should be so conducted that the effect produced on the persons present at it, or upon the public generally, should not be affected by ribaldry or profligacy. It should be carried out in a place which could not afford opportunities to the curious or the vicious to indulge their morbid appetites; and it should not be possible to commit crime in the presence of the criminal.

The place of execution should not be accessible to the public generally, or to women or persons under 21 years of age.

To effect these objects, I would recommend that the execution should take place in an open yard of the prison, in the presence of the sheriff, the governor and warders of the prison, the county inspector of constabulary, the sub-inspector of the district in which the prisoner's offence had been committed, of a certain number of the constabulary of that district, and in the presence of all the male prisoners undergoing any sentence at the time of the execution.

The sheriff, coroner, and magistrates should be authorized to give, each, a certain number of orders for admission to persons (not being women or under 21) to be present at the execution.

I think it should be a penalty attached to the commission of every offence, that the criminal, if convicted, might be compelled to be present at the execution of a fellow-criminal; and I think the opportunity afforded the magistrates

of attending and giving orders of admission would secure such a publicity as would ensure the punishment being duly and legally carried out.

In this way, I think, the effect produced on the public mind by the death of the criminal, and the instinctive horror of the mode of execution, would not be diminished, as they now often are, by the bravado of the prisoner, the sympathy of the spectators, and the clap-trap of the press.

I have to add that I have no objection to be examined upon the foregoing subjects.

I have, &c.,
(Signed) HENRY GEORGE HUGHES.

ANSWER of the Honourable Mr. JUSTICE WILLES.

SIR, Guildford, 1st August 1864.

I HAVE seen my brother Martin's answer, in the substance of which I concur.

I would add that in my opinion the fear of being hanged deters many a bully and coward from murder, and even from violence dangerous to life.

Also I have observed that the greater number of mankind look upon the punishment of death in the case of murder as alike just and awful.

As to being examined, I hold myself at the disposal of the Commissioners.

Your obedient servant,

J. H. Patteson, Esq. J. S. WILLES.

ANSWER of the Honourable Mr. BARON MARTIN.

SIR, Guildford, 2nd August 1864.

I HAVE received your letter of the 23d ultimo, requesting me to state, for the information of the Commissioners appointed to inquire and report upon the Punishment of Death, my opinion as to the efficacy of the existing laws. According to my observation trials for murder and sentence of death make a very strong impression upon the persons present, but the efficacy of the laws more especially depends upon the effect produced by the execution of the sentence. It is a very rare occurrence that an individual of the higher or middle classes is tried for murder (to which crime the punishment of death is now practically confined); and therefore it is from persons well acquainted with the opinions, and sentiments, and habits of mind and thought of the lower classes, that the best, if not the only real important information, can be obtained as to the efficacy of the Punishment of Death.

If the punishment be retained I think the second section of 24 & 25 Vict. c. 100. should be repealed, and the same discretion given to the Judges which they formerly had of directing sentence of death to be recorded. It seems to me not fitting that a Judge should be compelled to pronounce a long, formal sentence, stating the manner of putting to death, and a direction as to the disposal of the body after death, when he and very many of the persons present know perfectly well that the sentence will not be carried out, and that the punishment will be commuted. The present state of the law also affords a very strong temptation to a Judge (in favour of the prisoner) to deal loosely with the distinction between murder and manslaughter, which ought, as much as possible, to be avoided, and the crimes kept distinct; and it imposes great and unnecessary trouble upon the Secretary of State, and casts upon him a responsibility which ought to be borne by the Judge. I would also suggest that the formal sentence be enacted by an Act of Parliament, and that it be very much shorter than the one now in use.

As to myself, I use the present form in deference to the opinion of some of the Judges, who think that the sentence in any other form, although to the same effect, would not be in accordance with the law.

I shall be perfectly ready to give the Commissioners any information I possess, but I should feel obliged, if they desire to examine me personally, to be informed a few days before of the subjects of the examination, in order that I may direct my attention to and consider them.

I have the honour to be
Your obedient servant,

J. H. Patteson, Esq. SAMUEL MARTIN.

Answer of Mr. Baron Bramwell.

Gentlemen,

As you have applied to me, I deem it my duty to render you such assistance as is in my power, which, however, I believe, is very little. I wish at the outset to disclaim speaking with any pretence of authority. The questions you have to consider are not questions of law, not such as a practising lawyer or judge is professionally conversant with. No doubt any one who attends courts of justice has an opportunity of seeing some of the workings of the law which inflicts capital punishment; but I think this a very small advantage, if any. No doubt also a judge is naturally set thinking on the subject, and on the effect of the sentence he has to declare. But when so set thinking, I am not aware of any advantage he has over any other person of cultivated mind who reflects on the subject. My desire to state this proceeds from my desire to add, that if I can feel I have no particular authority in this matter as lawyer or judge, so also can I feel, as I do, that I have no professional prejudice on the subject, as it seems to be supposed judges may have.

I presume you desire no opinion or observation on what is called the "right" to inflict capital punishment; I take it for granted that the question you will consider is its expediency. Does it bring about a greater balance of good or less balance of evil than some other means would? Such a question, like most others, may be considered *à priori*, or as a matter of fact, a matter to be determined by observation and statistics. For my own part I confess my inability to solve the question in this latter way, or to do more than respectfully warn you against certain errors which are fallen into by those who rely on the figures brought forward. It is said that it appears that where capital punishment is abolished the crime for which it was inflicted diminishes. Of course we cannot in this country compare the effect of the punishment of death for murder and that of any other punishment for that offence, for here the punishment has always been death. And as to relying on the effects of a change from capital punishment to some other, in foreign countries, for murder, I think we do not know enough of the particulars to place any dependence on the reported results. Nor can we rely on the effect of change in our own country from capital to some other punishment for offences other than murder, because the *law* has never been altered till the *practice* has been altered. If no man has been hung for horse-stealing for 20 years, or only one of a hundred convicted, and then the punishment is by *law* abolished, it is idle to compare the amount of crime for 10 years before the change of the *law* and 10 years after. So of other offences. Besides it must be remembered that murder is very different from any other offence in the minds of everybody. No doubt judges, juries, witnesses, and prosecutors ought to do their duty as much where the question is if a prisoner stole a sheep, as where it is if he committed murder, though death is to follow in each case if there is a conviction. They ought; but if they feel that in any one case the punishment is *right*, and in the other *wrong*, they will do their duty more readily in the former case than the latter. I can, for these reasons, place no reliance on what may be said to be the experiences of changes from capital to some other punishment.

Another argument from experience is used which is also fallacious. It is said the acquittals in trials for murder are much larger in proportion than in other cases, showing that juries will not convict, that murderers go unpunished, and that therefore the punishment is inexpedient. Supposing the facts well founded, the conclusion does not necessarily follow. If in 10 cases there are nine wrong acquittals, but the one conviction saves a hundred more murders, which would take place under any other system, then the present system is good. I don't say it is so; what I say is, that as the object of punishment is to prevent crime, we must consider as our object, not how to punish the greatest number of persons, but how to prevent the greatest number of murders. But I am not sure the facts are as supposed, and here again I must repeat with great respect my warning as to figures. It is supposed that juries improperly acquit in murder from an objection to the punishment of death, and the proportions shown by the returns are relied on. Now, in the first place, I believe those returns do not distinguish between cases of infanticide and those of adult murder. As to the former, it is not the fault of the jury that the prisoner is acquitted. The case is withdrawn from them, by a contrivance I

don't presume to censure, but which certainly prevents them expressing their opinion. Further, many a person is committed for murder whose case most properly is only manslaughter. This is commonly the verdict of a coroner's jury. They know that no result immediately follows thereon, and there is more vigour in such a finding than in the comparatively mild one of manslaughter, and it is undoubted that for some reason coroners' juries are fond of distinguishing themselves, as is seen by their verdicts expressing opinions on matters of which they had no previous knowledge, and which they form under the excitement of considering the cause of a fellow-creature's death. Further, it should be remembered that in murder, the sufferer cannot be a witness. In all other offences, save manslaughter, he lives to say who wronged him. Again in many cases, especially in poisoning, there is the possibility of accident or suicide. Nothing like this occurs in forgery or larceny. Further, there are the acquittals on the ground of insanity, where the fault lies not with the jury, but with a class of witnesses who have received undue toleration. In my own experience in cases tried before me I can only remember two wrong acquittals for murder. One was a case where the prisoner had murdered a woman with whom he cohabited, and who had angered him by having intercourse with other men and taunting him therewith. The jury acquitted him wrongly. They asked if they could find him guilty of manslaughter; showing they thought he killed her. I told them no. They acquitted him. I was told that the foreman afterwards said, they thought death too great a punishment, considering how he had been provoked. The other case was that of a woman who poisoned her husband, at least I think she did, and I think she ought to have been convicted, but I cannot say the verdict was perverse or wilfully wrong. I cannot say that in either of these cases the jury acted on any general objection to the punishment of death.

In the result I cannot, as a matter of history or experience, or statistics, say that capital punishment is inexpedient. Neither can I say it is expedient. It seems to me we are driven to consider it *à priori*, or as a matter of speculation, which I now proceed to do.

I think it cannot be doubted that no punishment is so deterring as death—that is to say, none now possible. It would not be unreasonable, however, to inquire what it is proposed to substitute. Nothing now existing is equal to it. Penal servitude and transportation are not to compare with it. It should be remembered that these punishments are not so dreadful to the vast majority of those who suffer them as they would be to those who provide them. Labour and subjection to the orders of others is the lot of the greater number of those who come within the scope of the criminal law; and what would horrify a person of education and refinement, viz., the association with those who are the bulk of the convicted, is inoperative on those who constitute that bulk. The late Mr. Phillips suggested, in very forcible language and with much striking accompaniment, a prison to be called the "murderer's grave." But there is something rather melodramatic in it, which I doubt would prevent its being readily adopted. But neither that, nor anything admissible I can think of, is in my opinion equal in its deterring effects to the punishment of death. Torture of course is out of the question, though that also would not deter like death. "While there is life there is hope." Every man would calculate on the chance of pardon, of escape, of something. And every man would exaggerate the chances in his own favour. We all do so in all things. I am aware this is an argument against uncertainty of punishment, and consequently against a punishment whose nature makes its infliction uncertain. On this I have already observed. I daresay the chances of an acquittal in murder are exaggerated by those who contemplate murder; still I think the certainty of life, and the chance of something turning up in it, with any punishment, vastly less deterring than the chances of death. Why is it that such efforts are made to prevent the verdict, the judgment, and the execution, where death is the penalty? Why do those who seek a mitigation of punishment declare loudly that penal servitude for life may well be inflicted,—anything but death? Really the matter requires no proof, no argument. Nothing appals, nothing deters so much as that which ends everything for which most men presently care,—life. Common experience and common knowledge tell us so. It is impossible to speculate whether there would be many more murders if the punishment for them were not capital; but I think it would be a fearful experiment. Murder is a

remarkable crime. In some cases it rises from deliberation,—a wife or husband or relative in the way of some other connexion or of some property. In this class of cases the very motive involves a continuance of life to enjoy that which was sought by the removal of the impediment. In some cases of sudden passion, no doubt, death may be inefficacious to prevent murder, but so would any other punishment be, and we never can tell how many of these cases the fear of it prevents.

In the result, then, I think this the most influential of punishments. I do not believe it is rendered ineffective by want of courage to inflict it. Then what are the reasons against it? The murderer himself cannot complain. It is said it is a brutalising punishment, involving an executioner who must be indifferent to human life. I doubt the truth of the former remark. I think the solemn and anxious way in which a man is tried for his life, the grieved look of the jury, the feelings of the judge and the audience, and the subsequent treatment of the prisoner take away anything like the appearance of cruelty. As to the executioner I can say nothing, save that there is no unmixed good in anything human. It is said that capital punishment does not deter, as pick-pockets follow their calling at the execution itself. No doubt. But what have murder and its punishment to do with them? They don't intend to commit the crime, and are no more influenced by the sight of its punishment than they would be by seeing a man burned for heresy; perhaps think both punishments well deserved for their respective crimes. So again it is said that every murderer has witnessed an execution. Very likely. The same disposition which causes a man to take life, causes him to wish to see the taking when it is taken by others. What really is this argument good for? Is it meant that capital punishment does not deter at all? That cannot be. Then it deters somewhat, and all the matters referred to prove is that it does not deter infinitely. It should be remembered we have no returns or proof of the number of men who have seen an execution, and in consequence have not committed murder.

Further, I believe the public feeling, its conscience, or sense or notion of justice, is opposed to the abolition of the penalty in cases of murder. Would there not have been an universal feeling of regret, and that wrong had been done, if the Fordingbridge murderer had not been slain? Would there not be the same if the murderer of Mr. Briggs, be he who he may, did not lose his life? So of the five pirates executed about six months ago. So in the case of Townley; there was a general regret at the necessity for sparing him. It may be said this cannot be, because there are petitions for the abolition and none against it. But it should be remembered that the dissatisfied, and those who want a change, make themselves heard, whilst the satisfied who want no change are silent. Those who are for letting well alone, say nothing about it. I believe, I repeat, that the large majority of people think the law not only expedient, but what they call "right." The *lex talionis* may not be very logical, but it is popular, and has an air of justice. Now laws should not only be made for the gratification of those who are governed by them, but in order that they may be observed they should be in conformity with the feelings of the governed; not even better than they can bear. Again, take the case of the relatives and friends of the murdered man. They would not be satisfied with less than the murderer's death; at least in most cases. It may be said this is revenge, which the law ought not to assist. Whether that is the right name or not, it is the feeling to which the law is much beholden; for it brings offenders to justice. It exists in human nature, and therefore must be remembered in legislation. I refer again to the cases I mentioned, I mean the Fordingbridge and other murders. Is not the death of the murderer in such cases a not unreasonable desire in the relatives and friends of the survivor?

I wish to make another remark, which I hope I can so make as not to be misunderstood. Whatever may be its intrinsic value, human life should be highly prized by the law, and popular feeling should be directed the same way. But do not let us put it at one rate for one purpose, and at another for another purpose. Life is daily sacrificed in this country for purposes of profit. Hundreds of lives are lost yearly in mining, in shipping, and otherwise. I am aware that in such cases the life is taken by misfortune; it is not intended to take it. In one sense it is not intended, but in another it is. If the facts show that on the average in such and such a work, as for instance making a

railway of a certain size, so many lives are lost; those who make the railway purposely do an act a consequence of which is the loss of so many lives. Now it seems strange that life should be plentifully taken for purposes of profit, but not to be touched for the purpose of saving life. It is said life should not be taken, because if wrong it is irreparable. But I say the risk of that may be worth running. It is an argument against all punishment. Whatever it is, it may be wrong, and the wrong may never be redressed. But the risk now-a-days is nought. No one can point to a doubtful conviction for murder for these 20 years, with perhaps one exception, as to which *I* think there was no doubt. I think then that the punishment of death for murder should be retained. But it is said that an exception might be made where the murder is not premeditated. I don't agree. Some unpremeditated murders are as bad as the most deliberate, and the disposition which gives rise to them as much requires control. A man going poaching has a bundle on his back. A policeman without touching him says, "What have you there?" and is shot, and dies, without further cause or provocation. The murderer had no particular ill will against the sufferer, and did not know he would meet him, and therefore could not have premeditated the act. But did he not deserve hanging? Did not that ferocity of disposition which made him act as he did on the spur of the moment as much require control as a desire to get another's goods, revenge, or other cause of murder requires checking? It seems to me that exceptional cases must be left to the mercy of the Crown. As for instance where a woman taunts her husband with her falsity to him: if he ought not to be hung for killing her, neither ought he to be punished for life.

Another matter into which you are to inquire is the expediency of having executions public or private. It is said very disgraceful things take place at public executions. So they do, but the disposition to commit them existed before, and is not caused by the execution. It has attracted a mob of the vilest, and they behave accordingly; still it would be desirable they should not have the opportunity. On the other hand, publicity is so thoroughly a part of our system, and is so useful, that one hesitates to give it up in any one thing. I think there might, however, be a species of publicity in executions without the present offensive accompaniments. Let the man be executed before a jury, summoned on purpose, not that which tries him, as they would then have an additional wrong motive for acquitting. I think this would be preferable to the present practice, but I speak with the greatest hesitation.

I submit to you these observations, at best a bundle of doubts, sincerely wishing they were more calculated to help you.

I am, &c.

Four Elms, 27th Oct. 1864. G. Bramwell.

Letter of Baron Bramwell to the Commissioners.

Gentlemen, 3, Old Palace Yard, 15th Nov. 1864.

Since I wrote to you, I have had my note books examined, and find as follows. I have tried 55 persons for murder, in 44 cases. Of these, there were nine cases of infanticide, with 10 prisoners; an acquittal or verdict of concealment in every case but one, and in that a verdict of manslaughter. There were verdicts of guilty in 16 cases against 22 prisoners. There were six other cases with seven prisoners where the verdict was manslaughter. All these verdicts were right, save one. In that case the verdict was manslaughter; the man had murdered his wife, who had immediately before committed adultery. I told the jury I could see no evidence to reduce the killing to manslaughter; they nevertheless so found, but not necessarily from any general objection to capital punishment. Six prisoners in six cases were acquitted on the ground of insanity, and rightly. I do not mean that the prisoners were as insane as the law requires; but the cases were those of real madness, not of that foolish and sometimes dishonest kind called moral insanity, which really, if it means anything, means insane morality, nor cases of homicidal mania, which, with other criminal manias, means a strong propensity to commit the crime, calling for a strong countervailing inducement.

There were verdicts of not guilty of 10 prisoners in nine cases. Of these seven verdicts were right and three wrong. Two I have already mentioned;

the third was the case of a boy under 12 who killed a child of three or four years old in a very cruel way. I think it due to the jury to say, that I believe, if the verdict was wrong, it was more my fault than theirs.

I have, &c.

To the Commissioners for inquiring into Capital Punishments. (Signed) G. Bramwell.

Answer of Mr. Justice Mellor.

16, Sussex Square, Hyde Park,
November 1, 1864.

Sir,

I am not quite sure whether I correctly apprehend the extent of your question touching "the efficacy" of the laws at present in force relating to capital punishment.

I am decidedly of opinion that it would be inexpedient to abolish capital punishment.

I find no difficulty in inducing jurymen to discharge their duty. When I first entered upon the practice of the criminal law, there did appear a strong feeling against the infliction of the punishment of death on the part of juries, and a consequent indisposition to convict. That feeling has, in great measure, disappeared since the punishment of death has only been inflicted in cases of murder. My opinion is, that the prevailing feeling is now strongly in favour of retaining capital punishment as the only adequate punishment for *real murders*, and I confess that I share in this feeling.

I certainly think that a new classification of the offences included in the crime of murder is desirable. The legal definition of murder includes many cases in which the Judge invariably recommends a commutation of the sentence, and I think that the sentence of death should not be passed in such cases.

I may say that, having considered the suggestion contained in the paper circulated by Mr. Waddington, as to the propriety of dividing the offences at present included in the legal definition of murder, into two classes, that I agree in such suggestion.

If after this expression of my opinion the Commissioners should be desirous to examine me further on the subject, I shall be very willing to give them any information in my power as to the results of my experience, both as advocate and judge.

I have, &c.

James Henry Patteson, Esq. &c. &c. &c. John Mellor.

Answer of Mr. Justice Blackburn.

Sir,

I have had the honour to receive your letter requesting me to furnish to the Commissioners my opinion as to the efficacy of the existing law as to the punishment of death.

I regret that I am not able to furnish them with any observations of importance.

As a judge I have necessarily observed the demeanor of those present at trials for capital offences, and the result is that I think that the proceedings are always attended with a seriousness and solemnity far beyond that of ordinary criminal trials, even those for crimes such as it is known if proved will be punished by a long term of penal servitude; and the inference I draw from this is that no other punishment is looked upon with so much awe as that of death, at least by that class of persons who frequent courts of justice. These, however, are generally of a higher class than those who commit crimes, and I have no peculiar means of knowing what effect the sentence produces on the criminal classes themselves.

I have also generally found that the jurors have done their duty in such cases as conscientiously as in other cases. There are cases in which I have seen an apparent resolution not to convict because the sentence would be death; but these are rare.

I must, however, except one class of cases of what in point of law amounts to murder, I mean those of infanticide. I have never known a capital conviction for that crime; this is partly no doubt owing to the state of the law which makes it very difficult to obtain legal evidence that the child had before its death gained an independent separate existence; but even when that difficulty is overcome the whole sympathies of everyone seem to me against the law which treats this crime as not different from other murders.

From what I have said you will perceive that I do not think that any benefit would be derived from examining me *vivâ voce*. Should, however, the Commissioners wish it, I will attend, on being requested; in which case you will oblige me by giving me previous notice of what the points are on which the Commissioners require information.

I am,
Your obedient servant,
J. H. Patteson, Esq. COLIN BLACKBURN.

ANSWER of MR. JUSTICE KEATING.

The operation of the law under which Capital Punishment is at present inflicted appears to me to be in some respects very unsatisfactory. The chief defect I have observed is, the uncertainty that exists whether the sentence will be carried out. In a considerable proportion of cases in which convictions for murder take place it is perfectly well known to the Judge, jury, and oftentimes to the convict himself, that the awful sentence, which, in obedience to the law, the Judge is bound to pronounce, is a solemn mockery, and never intended to be carried into execution. The effect is, I believe, most pernicious, though in the present state of the law, unavoidable. The case in which the sentence passed by a court is not carried out ought to be rare and exceptional, and I feel sure that a system which compels a Judge to pass a sentence of death not intended to be carried out, even though the facts remain unaltered, contribute to defeat the only legitimate object of all punishment—the prevention of crime. The existing state of things results from the fact, that the same compulsory sentence is attached to all cases of conviction for murder, whereas although their legal incidents may be the same, they vary much in real criminality, whilst the law satisfies the averment "of his malice aforethought" by proof of construction, as well as of actual malice; the difference in the real character of the offence, in the one case and in the other, is in most instances obvious to every one. The man who in shooting at his neighbour's fowl with intent to steal it accidentally kills a man, commits an offence very different in character from that which is perpetrated by one who from motives of revenge or self-interest assassinates another, yet they both commit murder, and the sentence on conviction must be the same. It is true the inequality in such sentences would be set right by careful and anxious consideration at the Home Office, but the correction of sentences pronounced in open court by means of a private investigation, however well conducted, does not, I believe, inspire confidence amongst those who look to the law for protection. The question then arises, how is this to be remedied? and it is one not free from difficulty. To change the legal definition of murder so as to exclude cases of constructive malice, would in my judgment be in the highest degree dangerous, for sometimes such cases may equal in severity those in which the malice is actual. The soldier who determined to kill the adjutant would not, if he had done so, have committed a worse crime than he did when he killed his colonel, believing him to be the adjutant, and many other cases will suggest themselves where, although the crime itself is clear, the exact motive of the murderer is doubtful and actual malice cannot be proved; so again, to allow the Judge any discretion as to the sentence to be pronounced upon a conviction for murder would, in my opinion, be a great mistake; but what I strongly recommend to the consideration of the Commission is whether the evil might not be effectually met by allowing the jury to append to their verdict the existence of mitigatory circumstances, and in that case making it obligatory upon the Judge immediately to pass sentence of penal servitude for life. It may be objected that this would practically confer upon the jury the power of saying in what cases of murder Capital Punishment should be inflicted, and undoubtedly it would have that effect; but it is well worth considering whether that would be a serious objection. The

moment it is conceded that in a large proportion of convictions for murder Capital Punishment might not be inflicted, it follows a selection must be made, and its being done by juries, who by the cases, I think not only give more satisfaction than the present system, but would also relieve the Minister of the Crown from a most responsible and oftentimes a very odious duty. That occasionally mitigating circumstances would be found by the jury without sufficient grounds I do not doubt, we know that such is the case in France; but after a time public opinion would diminish the number of such cases, and when they occurred the evil would not be so very serious in commuting the punishment of death to that which is scarcely less severe, though undoubtedly less dreadful. Nor, judging from my own observation and experience, do I think those cases would be so numerous as at first sight might be supposed. It must not be forgotten that at the present time juries possess to a considerable extent this power of selection, which they sometimes exercise in the objectionable way, of finding verdicts of manslaughter contrary to their oaths and the evidence, or appending to their verdicts recommendations to mercy, which are usually effectual for the object they have in view, namely, to save the life of the particular criminal. So cases do occur, though rarely, when even acquittals take place from the same motive, but in cases of what may be called *real* murders, that is, when there has been "malice aforethought," in the ordinary acceptation of the phrase I have never found juries at all indisposed to find according to the evidence, nor anxious to interfere by recommendation or otherwise between the sentence and its execution. I think therefore that juries might be safely intrusted with the power to which I have referred, and if ever the time should arrive when juries (acted upon by public opinion) determined practically by their verdicts to abolish Capital Punishments altogether, it would then in my opinion be absolutely necessary to consider whether a change in the law in that respect would not be expedient, and I express this view, notwithstanding my own conviction, that no further change in the law than what I have adverted to ought at present to be made. There are details connected with such a change which would, I think, become necessary, but to which I do not at present advert.

Another subject, to which I doubt not the attention of the Commission has been already directed, connected with the operation of the laws under which the punishment of death is inflicted, is that of infanticide, by which I mean the murder of newly born children. This is a crime one would suppose of the most atrocious kind, and yet in practice it passes unpunished, except as a concealment of birth. It is in vain that Judges lay down the law and point out the strength of the evidence, as they are bound to do, juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish. It is useless to inquire why this is so, of the fact that it is so the Commission can obtain abundant proof; the result is of course most injurious, and I believe can only be remedied by some such alteration as that I have pointed out. Juries will not convict whilst infanticide is punished capitally, and yet to make it by law less than murder, would be as it were a contradiction in terms, for there is no reasonable definition of murder which would or ought to exclude it.

I have thus sketched the result of my own observation and experience, as to the most prominent defects in the operation of the laws under which the punishment of death is inflicted. As I have done so without communication with any of my brethren who may have sent in their views to the Commission, it is possible the same ideas, better expressed, may have already been put forward, if so the present may be laid aside.

London, 30th Nov. 1864. H. S. KEATING.

ANSWER of MR. JUSTICE BYLES.

SIR, Reading, 22nd December 1864.

I FEAR that I have very little to communicate worthy the attention of the Commissioners; but the experience of many years in criminal courts, both under the old system and the new, has produced some very decided convictions.

I am persuaded that the law relating to Capital Punishment, as now administered, is most efficacious in repressing deliberate assassination, whether

by violence or poison, and that the safety of the public would be endangered by the substitution of any other punishment. I heartily rejoice in the abolition of the punishment of death so far as it has at present proceeded. Not only was the old system barbarous and cruel in the extreme, but public opinion had rendered its continuance impossible.

Yet some of the anticipations of favourable results from the substitution for the punishment of death of less severe but more certain punishments have been signally disappointed. Take, for example, the crimes of forgery and arson, both of which are always followed by long sentences of penal servitude.

Both offences have multiplied, and forgeries especially have increased, not only in the number, but in the magnitude and audacity of the crime. Such an instance of forgery as Roupell's is unprecedented. As to the crime of arson, at the last winter assize for the county of Oxford, there were but 11 cases for trial in the county, and yet seven prisoners were convicted of arson. All the cases of arson but one were most serious offences, and in more instances than one the crime was committed without malice, in the popular sense of that word, by persons in distress, avowedly for the sake of the food and shelter involved in the punishment.

It seems to me that to rely on penal servitude for life within the walls of a gaol, as a substitute, in cases of murder, for the punishment of death, would be attended with imminent peril to the public. Penal servitude is found by experience not effectual to deter from crimes, and I fear that penal servitude for life never can be made effectual to deter from the crime of murder. For these, among other reasons,—

First, this alternative is presented :—You must either preserve the prisoner's health in mind and body, or destroy it. If you destroy it, the punishment is, in effect, death by slow torture, and is far more cruel than hanging. If you preserve the prisoner's bodily and mental health, then, such is the power of the human constitution to adapt itself to circumstances, that the longer the imprisonment, the easier the prisoner bears his hardships and privations, till at length imprisonment with all its miseries becomes tolerable, if not agreeable.

Secondly, if the extreme of hardship could be reconciled with life and health, still the punishment would fail to deter, because it is not exemplary. The uninformed and unthinking masses do not witness, and therefore do not imagine or dread the sufferings endured by a prisoner.

Thirdly, the sentence would not and could not be carried out under all circumstances, and to the end of life. A prisoner who had lived into other times and into another generation would certainly be treated with commiseration. Humanity would at all times require that he should have medical assistance and nursing in his sicknesses. How would he be disposed of in old age, when his habits and body are changed and his personal identity scarcely remains? Is there not a danger that at last he would be treated like a pensioner on the State for life, as if he lived at Greenwich or Chelsea? Perpetual imprisonment, therefore, seems likely to be no effectual substitute, and no other substitute is suggested.

But the punishment of death is free from all these difficulties. It is not cruel, yet it is exemplary, and terrible in the highest degree, and I think experience proves it to be most effectual in deterring from murder.

No one can have witnessed the scrupulous care and fairness with which a trial for murder ending in a conviction is conducted on both sides, and the awe and acquiescence with which the sentence of death is heard by the audience, without being satisfied that public opinion ratifies that sentence, and that it must have a powerful effect in preventing the crime of murder. And such an anticipation seems justified by experience. The crime of murder, in its popular sense, by which I mean deliberate assassination by violence or poison, is now in this country extremely rare in proportion to the population. It must be remembered that at this day all, or very nearly all, the murders committed are known. Yet multitudes work above ground and below, armed with edge or otherwise dangerous tools; but murder, in the sense of assassination, is scarcely heard of among them. Though poisons are multiplied, and the opportunities of using them with secrecy and effect have increased, yet all families now sit down to their daily meals in safety, and feel that they do so. I fear that both the safety and the sense of security would be taken away by an alteration of the law.

If, therefore, I am asked whether I think the punishment of death is efficacious in preventing murder, I must answer that I think it is signally efficacious.

I believe that multitudes of lives are saved by the *certainty* that wilful murder will draw after it the painful and ignominious death of the murderer. This certainly stifles the first suggestion. If that be so, then a change of the law would amount to the purchasing the lives of a few culprits by sacrificing the lives of many innocent people, and destroying the sense of security in all.

According to my observation, juries are ready enough to convict in cases of murder, and I never knew a convict executed as to whose guilt any rational doubt existed.

I would, however, not extend the punishment beyond the crime of murder, and not even to the attempt to murder. For though it may at first sight appear paradoxical, yet it is true, that while the punishment of death continues to be annexed to murder, the removing it from the attempt to murder (though the moral guilt be exactly the same) affords the public as much, and even more protection than if an attempt to murder were a capital crime. For the penalty attached to murder deters from the attempt as much as if it were attached to the attempt itself, while the not attaching it to the mere attempt affords a *locus penitentiæ*, and may restrain the hand of the assassin at the last moment. Besides, I much doubt whether public opinion would sustain and back up a sentence of death where life had not been actually taken.

There is an instance in which the punishment of death for murder is never inflicted, and that is infanticide. Infanticide accordingly has greatly increased, and is of every day occurrence. Nearly every case of concealment of birth is really a case of infanticide. But Courts of Justice only hear of unsuccessful concealments, which, it is to be feared, form but a very small per-centage on the whole number of concealments.

It would be an indirect sanction of infanticide to take it out of the category of murder. On the other hand, when the helplessness and distress of the poor girl is considered, it is plain that the degree of moral guilt is infinitely less and indeed altogether different from that of ordinary murder. Indeed, so strongly is this felt, that to carry out the law would be both barbarous and impracticable.

I think this difficulty and other similar difficulties might be remedied in some degree by restoring to the Judges the power of recording sentence of death in all cases in which they think the criminal ought not to be executed. I am not aware that that power, during the few years that it existed, was ever abused; and it not only relieved Courts of Justice from many a discreditable spectacle, but the Secretary of State also from much responsibility, which could be better exercised by a judicial officer, who has seen and heard both witnesses and prisoner. Moreover, it always remains in the power of the Crown to award execution.

I cannot suggest any mode of reviewing the propriety of a capital conviction better than that which at present exists. By the constitution of this country the power rests with the Sovereign, who exercises it through a single responsible minister. I believe the discretion is and has been far better exercised by an individual, who bears the full responsibility, and can command any inquiries or any assistance he may require, than by a plurality of persons, whoever they may be.

I thought until recently that sentence of death ought to be carried out in public, but the scandalous scenes occurring at recent executions, and the more extensive diffusion of information by the public press in country districts have changed that opinion. I now think an execution within the precincts of the gaol, or within any other suitable inclosure, might be conducted with such circumstances of solemnity, and yet by means of the public press (and especially the local press), with so much publicity, as not only to be free from the scandals which now disgrace it, but to be quite as notorious and far more terrible.

Too much care cannot be taken to establish the fact of execution, and to perpetuate the proof of identity, for the incredulity of the public is as unreasonable and astonishing as their credulity. Even under the present system of public execution an instance occurred of a notorious criminal executed on the Norfolk circuit, in the reality of whose execution persons not of the lowest

order, and who were otherwise sensible and well informed, professed their utter disbelief.

I do not think I could give the Commissioners any assistance by attending personally before them, but I should be willing to do so if they would inform me beforehand on what branch of the subject they desire to interrogate me.

I have the honour to be,
Sir,
Your most obedient Servant,
JOHN BARNARD BYLES.

James Henry Patteson, Esq.

ANSWER of MR. JUSTICE SHEE.

SIR, Manchester, 22nd March 1865.

IN answer to your communication of July 23, 1864, I have to state, that for the reasons reproduced in the recently translated* work of Mittermaier, pp. 139–144, and particularly for the 3rd of those reasons, I am for the entire abolition of Capital Punishment, and of opinion that, until after a complete demonstration, upon adequate trial, of the failure of secondary punishments in the repression of the only crime (except treason) for which the punishment of death is now inflicted, it ought to be discontinued.

Not, however, deeming death punishment unlawful, I am free to consider to what extent, if still retained, its application may be restricted; and by what means, some of the evils which seem to me inseparable from it, may be diminished.

Nothing can be more lamentable than a widely spread opinion among the masses of the people, that a criminal executed for homicide has been more hardly dealt with than, regard being had to the actual guilt of his offence, and the circumstances of its commission, he deserved.

I think it most desirable, that an effort should be made, to distinguish between premeditated murder, the perpetrator of which is never an object of pity, and unpremeditated, and also constructive murder—homicide—of which the guilt is greater than that of manslaughter; but in the commission of which, the "malice aforethought" has but a momentary existence, or is rather a fiction of law than an operating motive of guilty action.

For murder of the latter kind there ought, in my judgment, to be a more severe punishment than for manslaughter.

It should be fixed by law, and not discretionary.

Regard being had to the undue severity of the social and family shame which attaches in this country to a girl's unchastity, to the frequent and fitful disturbance of a woman's reason after her delivery; to the scandal of the legal quibble, upon which verdicts of guilty of concealment of birth only, are gladly, on the least suggestion from the judge, arrived at by the jury, and the utter and hopeless failure of the existing theory of the law of murder as respects infanticide, it ought (in my opinion) when committed by a mother within a month after her delivery, to be excluded by special exception from the class of homicides, for which the punishment of death is inflicted.

Premeditated murder—murder prompted by cherished ill-will, or the desire of pecuniary gain, or done in a spirit of cruelty, wantonness, or oppression, or following the brutal and violent indulgence of passion on its victim—murder, the perpetrator of which is by all men held in abhorrence unmixed with any sentiment of compassion, should alone, in my judgment, so long as Capital Punishment is retained, be punished with death.

The life of a real murderer of this kind is, except for the purpose of preparation for death, of no real value to himself.

It is, on the contrary, could we make sure of his repentance, much better for him that he should die.

And as respects criminals of this class, due provision being made for the manner and circumstances of their execution, I should see no objection to Capital Punishment, were it not for the frequent horror of hurrying a fellow creature, known to be grievously guilty, out of life, in a state of too probable impenitence.

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* By John Macrae Moir, M.A., of the Middle Temple, Barrister-at-Law.

As, however, wise and good men in all countries have not thought of so much weight as I do this objection to Capital Punishment, I take leave to offer some suggestions for the mitigation of the evils which now attend it.

I think more time, not less than a month in any case, should be allowed, for awakening proper sentiments in the minds of criminals under capital sentence, and that with this view, all hope of mercy and all knowledge of any efforts for the commutation of their punishment being excluded, their treatment after conviction, should be in the highest degree kind and gentle, and avowedly directed to the end, of preparing them for death.

The practice of importuning convicts to confess, should be peremptorily prohibited.

It should be deemed a point of conscience and of honour with the ministers of religion who attend them, not to divulge their confessions.

They should have, from the moment they come under the influence of his exhortations, the assurance that he is (as he really is) their true friend, and that they may give him their whole confidence, without the least fear of its being abused to their prejudice, or the increased disgrace of those who are dear to them.

Treatment of this kind would soften the hearts of a large majority of criminals, and dispose them to repentance and resignation.

Lastly, I think that executions should take place within the precincts of the gaol in the presence of the sheriff, his officers, and a limited number of persons, of whom absolute silence should be required; and that instead of the burial service, a form of prayer reminding the criminal of the promise of pardon to all those who truly repent, long enough to occupy the whole of the time between his appearance on the scaffold and a few seconds before his death, should be read by the chaplain of the gaol or other minister of religion in attendance.

I am, Sir,

Your obedient Servant,

James H. Patteson, Esq. WILLIAM SHEE.

SIR, Clifton, 2nd March 1865.

THE questions on which the Commissioners desire my opinion are, as I learn from your letter,—

1st. Is it advisable to retain or to abolish the punishment of death?

2nd. Is it practicable to classify the offence of murder into different degrees involving different punishments?

3rd. You ask for a general opinion on the crime of infanticide; and,

4th. Whether, in the event of Capital Punishment being retained, executions should take place in private or in public?

1st. I have for more than 30 years been an earnest advocate for abolishing the punishment of death, my conviction of its inexpediency having through the whole of that period continually deepened.

I adopt nearly all the arguments which are usually urged against this infliction. Indeed, I cannot call to mind more than one exception, which is, that I do not concur with those persons who believe in its prohibition by Scripture, either direct or indirect.

With regard to the facts and arguments which I might adduce in support of my view, I will confine myself to such as from my professional pursuits have more particularly influenced my own mind, although perhaps they may not be considered as the strongest which the case affords.

Without denying that fear has some real effect in the repression of crime, the result of my observation and experience is, that the efficiency of deterrents is greatly overrated. Their force as preventives has been measured by the pain which they produce on the mind of the criminal; yet it must be obvious that pain which is not produced prior to his offence ought to be put out of the question, and also that we have rarely any opportunity of observing the operation of pain on his mind until after its commission, nor, indeed, until after his detection, and until his punishment is rapidly approaching.

Now, that the suffering of a criminal when he is in the position just described furnishes any ground for estimating the efficiency of the fear of death upon him during the hours of temptation is clearly erroneous. The two states of

mind are so different, that the latter furnishes no materials for arriving at the former. I have observed numberless instances in which even detection, apprehension, and trial, up to conviction, have apparently produced little or no impression on the fears of a culprit whom, nevertheless, the sentence itself has thrown into an agony of consternation; and I remember one case where the interval of a week occurring between the verdict and the judgment, a man, who had stood at his trial hale and ruddy, came up for sentence so emaciated as hardly to be recognized.

Passions and appetites looking forward to prompt gratification will generally overcome, if not obliterate, the fear of any consequences, however afflicting they may be when they arrive. I believe that the remoteness of an event, however certain, has this effect on all, whether criminals or not. The drunkard, with full knowledge that he is committing slow suicide, cannot bring himself to discard his bottle. Working men by thousands attach themselves to callings which they know, and never think of denying, involve an early death, which they do not flatter themselves there is any hope of escaping; and they work at their trades for wages very little in advance of those which their companions are earning in employments quite consistent with health and longevity, and requiring no more skill, if so much, as those to which they are sacrificing their lives.

But if to remoteness the element of uncertainty is added, no penalty that can be threatened, not even death under torture,—not "Damien's bed of steel,"—will suffice to overpower temptation. The present will be sure to assert with success its tyranny over the future; the degree of uncertainty is magnified in the would-be criminal's imagination, and to the sanguine and unreflecting such uncertainty changes its character and produces a confident expectation of impunity, and suggestions leading to this frame of mind spring up with great fertility. He will so conduct the transaction as to escape even suspicion, but if suspicion should arise it will be sustained by no proof. Should the prospect appear likely to be serious he will have time to escape, but even if apprehended and tried, the verdict cannot pass against him; witnesses may be bought off, or perhaps die; jurymen are hard to convince in capital cases; his counsel will find some point of law in his favour; he will break out of prison, and so forth, almost *ad infinitum*.

These considerations have led me to the conviction that to imagine intending offenders will speculate on the advisability of avoiding a capital crime, and be satisfied with committing one exposing them only to a minor punishment, is altogether illusory. Their thoughts dwell on absolute escape, and not on more or less of penalty.

The foregoing remarks are founded on the general characteristics of human beings; but as regards the only crime for which in this country death is now really inflicted—I mean, of course, murder—it so happens that there is a very large class who show that they are willing to purchase the gratification of revenge by the certain and almost immediate forfeiture of their lives. Their crime is often committed with even ostentatious publicity. On such criminals deterrents are powerless; and if it were possible to discover any test by which the question could be determined, I should expect to find the number of malefactors the condition of whose minds approaches to this state of recklessness very large, and upon whom, therefore, deterrents have less than even the small force which I attribute to them.

I agree with Lord Russell, however, in thinking that the punishment of death might have been expedient in past ages, furnishing as it does the most perfect form of "incapacitation." The executed criminal is rendered for ever incapable of repeating his offences; neither escape nor relapse is possible to him; neither can he seduce others by persuasion or example to follow his evil courses. At a period of our history, then, when criminals were regarded with no feelings but of scorn and hatred, or at best with absolute indifference to their sufferings, and when their reformation was undreamed of, it was by comparison humane treatment to put them to a speedy and merciful death, such as that by the halter undoubtedly is. The alternative was to keep them in loathsome dungeons, sometimes expiring by starvation, sometimes by the pestilence called the gaol fever, or again wasting away in prisons not so unhealthy as to destroy their inmates with promptitude, but exposing them to the severer fate of dying by inches, as it is called. The feelings of society are, however, now so

changed that we are suffering from an evil the opposite of those engendered by indifference—a morbid sympathy, or, to speak more correctly, a sympathy so keen as, in the absence of enlightened control, to produce morbid results comes over us whenever a criminal is brought into peril of death punishment. Witnesses and juries largely partake of this feeling, and even when it is overcome and a capital conviction takes place, how frequently it occurs that during the interval between sentence and execution the Home Office is put into a state of siege; witnesses, jurors, neighbours, and even relatives of the deceased, to say nothing of universal and unlimited philanthropists, uniting together in passionate solicitation that the life of the criminal may be spared. Nor is it to be expected that the minister on whom the ultimate decision rests can preserve a perfect equanimity. What is to secure him against so general an infection? The consequences must necessarily be an irregularity of action in carrying death punishment into operation, while to make such irregularity matter of reproach would be cruelty as well as injustice. It is hardly possible to believe without practical experience how far this extravagant sympathy will carry minds which, in the ordinary affairs of life, are perfectly well regulated. It fell to my lot, when at the Bar, not seldom to defend prisoners indicted for murder, and I found that in the clearest cases, and where there was no evidence of a feather's weight to raise a question of insanity (unless it is to be held that a murderer must of necessity be insane), I have been appealed to, as having acted as counsel for the murderer, to sanction an application for mercy to the Secretary of State; it being assumed, as a matter of course, that by some means or other I must have been brought to concur with the applicants in believing him so unsound of mind as to justify a reprieve.

This over-sensitiveness has a further operation, which, I think, ought not to be forgotten. It seems fatally to disturb the intellect of such as stand in proclivity towards crime.

Having for more than half a century watched with some attention the proceedings of criminals, I have observed on many occasions a strong apparent tendency (which I believe to be real) in any capital offence which excites public interest to reproduce itself, and I have thought this tendency confined to capital cases from the fact that in some, which are no longer capital, I have since the repeal failed to remark the feature to which I have adverted. So far, then, as relates to this class of criminals, Capital Punishment, I submit, is not merely inexpedient, but noxious.

The only other objection to which I shall advert is the irreversibility of the punishment. This operates injuriously in various ways. The juror who is ultra scrupulous demands such a perfection of proof to wring from him a verdict of guilty as can rarely be proffered, and he has much to say for his misgivings. Cases are not wanting, nor are they so rare as many believe, where the lives of innocent persons have been taken without any blame to Judge or jury. In judicial proceedings we must, according to Beccaria, be content with something less than absolute certainty. To reach a degree of probability so high as to justify our acting upon it must suffice. If so, it is plain that we ought to ascend higher and higher in proportion to the gravity of the act which is to follow. Should we then severely blame doubters who cannot rest with confidence on the amount of proof which satisfies their colleagues, but demand for their own future comfort something which in the majority of instances must ever be unattainable?

Another injurious consequence is that the death of the victim is a most serious impediment to investigation. The inquiry, if successful, cannot restore him to life, and hence his friends have nothing to set against the pain and labour which they must undergo in pursuing it. Again, the co-operation of the sufferer is often essential to the object, and always important in gaining sympathy. Mr. Barber so conducted himself in Australia as to win the confidence of the chaplain, and to produce in him a perfect conviction that he, Barber, was innocent. Hence a strong motive arose for taking up the case, which in the end was so completely satisfactory that not only was the Crown convinced that the evidence against the prisoner did not support the verdict, but the Court of Queen's Bench was, after two hearings, satisfied of Mr. Barber's perfect innocence, not only of the charge itself, but of any blameworthy conduct in relation to it.

It will be evident that these reversals, humiliating as they are to the adminis-

tration of justice, convey most wholesome lessons of caution and diffidence; lessons of which we cannot afford to deprive ourselves.

2nd. I think a classification of murder with degrees is capable of being made on sound principles, but I greatly doubt if the distinctions between one degree and another would be sufficiently broad and clear to serve as a practical guide to juries.

3rd. The foregoing observation does not apply to infanticide, where the child is so young as to suffer no pain from apprehension of its fate. A distinction will always be made in society between the crime when committed by a mother to hide her shame and when committed by others. But I am not convinced that the distinction is one of which the law should take cognizance. It appears to me that the offence, by whomsoever committed, should always be considered lower in degree than murder.

4th. I am in favour of private as opposed to public executions; assuming always that similar or equivalent provisions for insuring the fulfilment of the sentence to those now contained in the Bill before Parliament will be adopted.

I am, Sir,
Your obedient servant,

J. H. Patteson, Esq. M. D. Hill.

My Dear Brother, Hampstead, 31st March 1865.

I fully agree in the opinions expressed in your letter to Mr. Patteson on Capital Punishment.

In Mr. Charles Phillips's excellent treatise on the subject a fact is mentioned, showing in a strong light the small effect of hanging as a deterrent. It appears out of 167 persons under sentence of death whom the Rev. W. Roberts, of Bristol, had attended, 164 *had been present at public executions.*

How quickly the sight of an execution, by repetition, loses its shock may be gathered from the following extract from my book on Crime, page 169:—

"A benevolent and kind-hearted man, the governor of one of our county prisons, told me that the first time, after his appointment, that he had to prepare for an execution he was quite miserable; that the night before the event he had no sleep; and that such was the state of his feelings, that had it not been from a sense of duty to his wife and family, he should have thrown up his appointment. When, however, a second execution came on, he was astonished to find how much less his feelings were excited; and he said that after the third time such an occurrence made but little impression on him. He justly remarked, if such was the effect of repetition on himself, how little that was durable could be expected from the repeated sight of an execution on a coarse-minded and hardened criminal."

So high a value do criminals set on chances of escape (being gamblers for life as well as for money), so much are these chances increased by the frequent unwillingness, in death cases, of witnesses to give evidence, and of juries to convict, and so confident is every man in his good luck, that I think it highly probable, if the criminal class were polled, that, strange as it may seem, the majority would vote for the continuance of the law inflicting Capital Punishment. In support of which opinion I may refer to the following passage in Mr. Harmer's evidence before a Committee of the House of Commons in 1819:—

"The instances, I may say, are innumerable within my own observation of juries giving verdicts in capital cases in favour of the prisoner directly contrary to the evidence. I have seen acquittals in forgery where the verdict astonished every one in Court, because the guilt appeared unequivocal, and the acquittal could only be attributed to a strong feeling of sympathy and humanity in the jury to save a fellow-creature from sudden death. The old professed thieves are aware of this sympathy, and are desirous of being tried rather on capital indictments than otherwise. It has frequently happened to myself, in my communications with them, that they have expressed a wish that they might be indicted capitally, because there was a greater chance of escape!"

The strain to which juries must now often be subjected before they can force themselves to give a verdict of guilty, when this verdict will lead to the prisoner's death, was very lately evinced in the trial at Durham of Atkinson,

the miner, for the murder of his wife; for, notwithstanding the peculiar and long continued barbarity with which the murder was committed, eleven out of the twelve jurymen recommended Atkinson to mercy.

Many illustrations might be given of the tendency you point out of capital offences to reproduce themselves. The murders committed by Elizabeth Roberts and Alfred Jackson, the first two days before Müller's execution and the second on the very evening, and the all but successful attempt at murder by Greenwood at the same time, are cases in point. Others, too, are to be found in the section on Capital Punishment in the book on Crime to which I have already referred, particularly that of a governess who had become insane—her mind had probably been already tottering—by reading the account of Courvoisier's trial and execution, and who attempted to commit murder in the way practised by that criminal.

Many persons who in the abstract, are friendly to the abolition of Capital Punishment urge, as an objection, the difficulty of finding a substitute; but my experience as an Inspector of Prisons, during the many years that I held that office, enables me to say that any difficulty in the matter is imaginary, or that it can be readily surmounted. All that is required is a well-constructed and well-administered prison, with firmness at the Home Office to resist applications for release. Imprisonment for life should, in my opinion, be the doom of every person who is convicted of murder; and no amount of subsequent good conduct should diminish, by a single day, the period of his confinement. In prison I would require him by the sweat of his brow to earn every meal that he eats; and more than this, to perform a given quantity of work for the benefit of the family of him whom he has slain.

Isolated from the rest of the world, subjected to continuous toil, with nothing to create the interest in his actions so strongly excited in the case of a person under sentence of death, the remainder of the culprit's existence would pass as secure against his doing more harm as if that existence had been brought to a sudden and violent end; while if, perchance, facts should at any time be brought to light showing that after all he was not guilty, society would be saved from the horror and disgrace of having destroyed the life of an innocent man, and would be in a position to make him at least some amount of compensation.

Yours affectionately,
FREDERIC HILL.

LETTER from J. J. POWELL, ESQ., Q.C. and M.P. for Gloucester.

DEAR SIR, Temple, February 11, 1865.

HAVING had many years experience as a practising barrister during which I have been engaged for the prosecution or for the defence in many capital cases, I venture to trouble you with some observations upon the subjects of inquiry by the Commission on Capital Punishments, of which you are the Secretary, and should you deem them worthy of their notice will thank you to place them before the Commissioners.

I am of opinion that the punishment of death should not be abolished, but that it should be restricted to such cases of high treason as involve the actual levying of war upon or actual attempts upon the life of the Sovereign or the heir apparent; and to such cases of murder as involve the deliberate and intentional taking away of human life. In these cases I think the sentence of death should be publicly pronounced and inevitably carried into effect; in all other cases of treason or murder I think the sentence should be recorded, and although it should be competent for the executive to inflict the punishment if it thought fit to incur the responsibility of doing so, yet that in ordinary practice it should be commuted to some lesser punishment.

My reasons for retaining the punishment of death and yet restricting it as suggested, are these:—There are some crimes of such magnitude and atrocity that if it be lawful to inflict the punishment of death (which I believe and assume it to be) they not only, by the common consent of mankind, deserve death, but it is felt by the like consent that any lesser punishment would be inadequate. And if the repression of crime and not merely punishment for it be the only legitimate exercise of the criminal law, it is certain that there is no punishment so abhorrent to human nature, and by consequence so deterrent

from crimes which render men liable to it, as the punishment of death. All that a man has he will give for his life, and transportation to the most penal colony, servitude in its severest forms, privation and misery in their most aggravated shapes will be welcomed by any wretch whose alternative is death upon the gallows. The more difficult question perhaps is the deterrent effect of this punishment upon the criminal population or those likely to become part of it. This, as in other matters, depends in a great measure upon whether the spectacle is novel or familiar to them. The medical student who becomes an expert operator and anatomist has perhaps at one time fainted at the mere sight of blood, and so the man who has sickened at the first execution he has witnessed may have acquired, from frequent repetition, a morbid taste for witnessing them. When executions take place every month in London they are of little deterrent value, but if they recur at only long intervals the effect is proportionate to the novelty of the spectacle.

It may be asked how is the judicial and executive power to distinguish between cases in which the sentence should be pronounced and executed or recorded and commuted? My opinion is that it should be determined by the verdict of the jury, and that they should be required to pronounce a verdict of "guilty of murder" simply, or "guilty of WILFUL murder" (or some equivalent verdict), as the circumstances of the case require. I do not at all fear that juries would be unduly biassed in favour of life in pronouncing such verdicts. No doubt many such persons as those now convicted of murder and sentenced to death would be found "guilty of murder" only, and the sentence would thereupon be merely recorded and commuted; but that is the change I desire and contemplate. I would reserve passing the sentence of death with all its solemnities for the worst class of criminals; for those only who would go to their doom without any public sympathy. Under this system the jury might save from the gallows such criminals as Wright, Hall, and possibly Muller, but they would infallibly consign to it miscreants such as Rush, Tawell, and Palmer. I conceive that inasmuch as under this arrangement the form of the verdict would depend upon the facts of the case, it would be free from the objections which would attend a verdict of guilty "with extenuating circumstances," or even "with a recommendation to mercy," resulting probably from the feelings of juries rather than from their judgments.

I will only trouble you with a further observation upon the mode in which the punishment of death should be executed. I think that at all events for the present it should continue to be in public, but that in London it should not be in the centre of a space so confined as the Old Bailey. Why should it not take place at Milbank or some prison or penitentiary similarly situated? But if it be decided that it shall take place *within* a prison, then I think it should be with such publicity as will satisfy the public that the sentence has been executed. I doubt whether the representatives of the press should be admitted. I think the details now published respecting the execution of a criminal produce much evil, but in addition to the persons required to be officially present, I would summon a certain number of householders, say 20, taken indiscriminately from the grand and special jury lists to attend the execution; taking care on the one hand that their names were not known too long beforehand, and on the other that nothing but the order of a judge, made upon good cause shown to him, should exempt any person summoned from attendance.

I have, &c.

JOHN J. POWELL,
Q.C., and M.P. for Gloucester.

J. H. Patteson, Esq.,
&c. &c.

13, King's Bench Walk, Temple,
January 1865.

SIR,

IN consequence of your suggestion I have put together the following observations on the subject of Capital Punishment; they are little more than scattered thoughts which I could wish were better arranged and more worthy of being placed before the members of your Commission. I cannot pretend to have any special knowledge, but having been since 1836 connected officially

with the administration of the Criminal Law, the subject has been necessarily, to a certain extent, from time to time, under my consideration.

The only offences now punishable with death are treason, murder, and, I think, burning "King's ships"—the last under an old statute, 12 Geo. 3. c. 24., which I cannot find to have been repealed. My remarks, however, will be limited to Capital Punishment as applied to cases of wilful murder.

In the first place, I would venture to observe that, as I understand them, the arguments used by Romilly and others were not in favour of the total abolition of Capital Punishment; they were simply directed against its misapplication to offences relating to property at a period when the highest penalty was indiscriminately awarded to offences of the lowest degree, and as to which the public safety did not require the sacrifice of life. Even Beccaria, p. 103, though he denies that the punishment of death is authorized by "any right," acknowledges that the death of a citizen may be "necessary" when his existence may produce revolution in the state. Romilly in his Pamphlet, 1810, p. 31, says: "The only proper objects of Capital Punishment are those who have committed "acts which the public security requires should be punished with death, and "all who have done such acts are the proper objects of such punishment. "Capital Punishment should never be resorted to but where the public security "requires it."

With reference to the crime of deliberate murder, few have entertained an opinion that Capital Punishment should be abolished, while, on the other hand, there exist the published opinions of many learned and able writers, that death is the only adequate punishment for such a crime. The following opinion is to be found in Montagu's Punishment of Death, 1816. "Dr. Johnson says, "this terror should therefore be reserved as the last resort of authority, as the "strongest and most operative of prohibitory sanctions, and placed before the "treasure of life, to guard from invasion what cannot be restored." Clarkson states, that "William Penn, on his arrival in America formed a code of laws "chiefly on Quaker principles, in which, however, death was inscribed as a "punishment, but it was confined to murder." Lord Bacon says, "God him-"self first denounced death, afterwards inflicted it. Nor is any man to be put "to death but he that knew beforehand that he sinned against his own life."

Bentham, in his Rationale of Punishment, ed. 1830, p. 66, in speaking of retaliation as a mode of punishment, says, "the advantage that cannot be "denied to this mode of punishment is its popularity. This may be seen in "the case of murder, with respect to which the attachment to this mode of "punishment is warm and general. Blood (as the phrase is) will have blood. "Unless a murderer be punished with death, the multitude of speculators can "seldom bring themselves to think that the rules of justice are pursued;" (and again, at page 191, he says,) "There is, however, one case in which it does "seem to be popular, and that in a very high degree; I mean the case of "murder." Eden, page 222, says, "The proper judgment against deliberate "murder is death, and in the rigid infliction of this judgment both the safety "and morality of mankind are greatly interested." In Montagu's Thoughts on the Punishment of Death for Forgery,* page 67, the paragraph xxix. is as follows: "The sanctions of law, morals, and religion unite in condemning crimes "of cruelty and violence, as murder, &c., and in awarding severe punishments "against the offender;" and in support of this proposition the author observes, "Where the consequences of an offence are immediate and obvious, as in "crimes with violence, murder, &c., the whole community recoils from the act. "It is understood by all, and the moral and religious sentiments of the nation "will sanction severity awarded by the law. They unite in condemning murder "as a crime. Religion says, 'Thou shalt do no murder.' These sanctions "unite in inflicting the punishment of death for murder. There is an union "between the crime of murder and the punishment of death; there is an "accordance, an ascertainable proportion in the mind both of the criminal and "the public which cannot be mistaken." I might multiply these instances, but am content with those already quoted. I have merely set them forth for the purpose of showing that the so-called abolitionists have not advocated abolition in cases of deliberate murder.

* Published 1830.

Before considering the efficacy of the punishment or its deterring influence, I assume that, looking at the subject politically and socially, the right of a state to inflict Capital Punishment is admitted. According to Blackstone, "the right "of punishing crimes against the law of nature, as murder and the like, is in "a state of mere nature vested in every individual, and that in a state of society "this right is transferred from individuals to the sovereign power;" and Eden, p. 21, says, "Capital Punishments are in all states necessary." I will not enter upon the religious question, as the advocates on either side can readily find texts upon which to base an argument, and indeed I am at a loss to perceive how, satisfactorily, an argument can be based on purely religious grounds, for "the truth is, that in seeking to prove our opinions out of Scripture, we "are constantly falling into the common fallacy of opening our eyes to one "class of facts and closing them to another. The favourite verses shine like "stars, while the rest of the page is thrown into the shade." It is difficult, however, to conceive that there can be any misunderstanding as to the recognition of the right by the Established Church when we look at the words of the 37th Article, "The laws of the realm may punish Christian men with death "for heinous and grievous offences." I fully believe that the great masses of the people look upon Capital Punishment as an absolute necessity in case of deliberate murder; and it is impossible to believe that any punishment can be more exemplary or have a greater deterring influence than death, which has been described as of "dreadful things the most dreadful."

I have looked in vain for any adequate substitute. I have seen but two suggested, penal servitude for life, and the proposal of the late Mr. Phillips, of "perpetual, certain, and incommutable imprisonment in a prison to be appro- "priated exclusively to the convicts for murder, to be built on an elevation "visible '*but secluded,*' and to be called 'the grave of the murderers,'" but such substitutes would not only be far more cruel, if carried out, than death (in fact the latter rather suggests the idea of death by slow torture), but, as I believe also, they would have little or no deterring influence. There would always be the hope of escape, with no additional fear operating on the mind of the convict to prevent the use of deadly violence even to his gaolers. There is a further objection, as it appears to me, to the substitution of perpetual imprisonment. Suppose the convict to be 30 years of age at the time of his conviction, if he does not become insane in the course of 20 years he may still be looked upon as an object of commiseration, and many may suppose that he has sufficiently atoned for his offence, if it be not forgotten or become unknown to many others. Again, as the imprisonment, I presume, would be upon the separate system and entirely distinct from that known as penal servitude, it must be remembered that numerous chaplains and medical officers of gaols have given their opinion that separate confinement beyond 18 months tends to destroy either the health or the intellect. Besides there is this important consideration in connexion with secondary punishment in cases of murder, that the standard of punishment for all other offences must be reduced, and the secondary punishment for murder must be widely different from that allotted to every other crime.

It is universally agreed that certainty of punishment, by creating terror, is the great preventive of crime. This is eminently so with reference to the criminal class, and doubtless the almost certain knowledge, that for the crime of murder the punishment is death, frequently stays the hand of the otherwise reckless criminal. But there is another and larger class not, so to speak, belonging to the criminal class who commit deliberate murder from motives of envy, anger, revenge, or subsequent gain, with such it would be more correct possibly to say that certainty of detection would be the greatest preventive, because those belonging to this class generally have no immediate apprehension or fear of ultimate punishment, which they anticipate escaping by their own ingenuity and contrivance. In fact, if anything is weighed against the crime in its contemplation, it is the improbability of detection. As to such offenders it may be urged that no example or possibility of Capital Punishment would produce a deterring effect, at the same time few will deny that the most dreaded punishment should follow the conviction of such offenders. But does the existence of such offenders prove that the punishment of death has no deterring influence? Is it not rather to be wondered at that with so large a population there should

be comparatively so small a number of convictions for murder? Is not the comparatively rare occurrence of Capital Punishment evidence rather that the deterring influence operates beneficially? and how? because though it is impossible altogether to prevent murder, yet this awful punishment by example teaches the young, and is calculated from the solemnity of its warning to correct and check during their early years every tendency to so fearful a crime as murder, presenting a solid reason and inducement to restrain the first impetuous sallies of anger, and to suppress the feelings of resentment and revenge. It thus exercises an active influence in preventing, to a great extent, those crimes which arise from sudden outbreaks of uncontrolled passion.

I cannot but think that, in all cases of murder, the judge before whom the conviction takes place should have power to record the judgment; because it is most expedient that when the law declares punishment to be necessary it ought not to be remitted, and that when it is not necessary it ought not to be pronounced. The object I have in view is, if possible, to render the certainty of punishment greater, and to prevent the prerogative of mercy vested in the Crown from having the dangerous tendency of rendering the punishment uncertain.

There are cases of constructive murder, and others committed after provocation, though not possibly under such circumstances as in either case to legally reduce the crime to manslaughter, in which it would not, in the opinion of the presiding judge, be desirable to carry out the extreme sentence, and as the judge to whom all the facts are carefully presented is best qualified to estimate correctly the true complexion and character of the crime, he should not, in any case where he is of opinion that the sentence should not be carried out, be compelled to pass the formal sentence in all its solemnity, but be at liberty to record the judgment, that is, be vested with a discretion to prevent the execution of the sentence. Much has been said as to defining the particular cases in which Capital Punishment should or should not be carried out, but it is extremely difficult in practice to alter established definitions.

There are already two distinct kinds of murder, which may be called deliberate and constructive; in the first the malice is express, in the second implied, but it is almost impossible, without having the peculiar circumstances of each individual case, to classify them, so as to declare by enactment in which class execution shall follow; but I venture to suggest that upon the finding of the jury the judge should either pronounce the sentence or record the judgment. In either case he should certify to the Secretary of State the quality of the malice, together with the evidence and verdict, and a statement as to the course adopted. I cannot but think that to present an alternative to a jury is wrong in principle, and calculated in practice to lead to mistaken verdicts. The finding of the jury should be the result of a positive question with reference to the facts. The verdict should be given as to the substantial charge first, and then, in the event of a negative verdict, the jury should have the minor charge submitted to them. I state this from frequent observation, that on trials for felonious wounding, juries have, in very serious cases, negatived the intent and convicted of the unlawful wounding only, merely because they have been told that they are at liberty to do so, but without at the same time correctly appreciating the distinction.

Whenever sentence is actually passed, I cannot but think the execution should follow within a much shorter time than is the practice now, the object being to hold out "the image of unavoidable and immediate punishment, the "impression of terror diminishing in proportion to the distance of the object." In expressing this opinion that the execution should follow the sentence within a shorter period than is the present practice, I beg leave to suggest that if any means could be devised by which the decision of the Crown could be ascertained, especially where the jury have recommended to mercy, it would be well that this should be done before passing sentence or recording judgment; I cannot but feel most strongly that the effect of passing so solemn a sentence which is not afterwards carried out, is a positive mischief. In London there would be no difficulty in making the report to the Home Office, and acting on the decision, but in the country this might not possibly be so easily practicable.

I think a court of criminal appeal to reconsider facts unnecessary and objectionable; in fact, such a court would, I much fear, only give rise to want of

caution in juries, greatly limiting their sense of responsibility, and only be of use in the event of facts being disclosed after conviction. Such a case in these days rarely occurs, and an application for postponement, based on substantial grounds, is never refused. The final appeal for mercy must necessarily be to the Crown through the Home Office, and as that Office is administered I know of no safer tribunal.

It is certainly not within my experience that juries wilfully return verdicts contrary to their oaths; true it is, in some cases of murder, verdicts have been returned for manslaughter, but then it must be recollected the alternative has been placed before the juries, and in other cases verdicts of acquittal have been returned where the majority of those in court would have been better satisfied with an adverse verdict. It must be remembered, however, that there are few cases in which the element of doubt, however slight, does not in some shape present itself.

With reference to infanticide, I think there ought to be some alteration in the law; but the alteration should, I think, be limited to the mothers destroying during, or immediately before, or after the birth, their illegitimate children, with a view to concealment, but a difficulty arises as to the mode in which accomplices should be dealt with. This is a question which would require great consideration. It is possible that the guilt of accomplices in such cases might be greater than that of the mother; if so, it would be necessary to make them principal offenders. There is also a difficulty as to the limit of the punishment. I am disposed to think that a positive fixed sentence, say of imprisonment or penal servitude, would best tend to check the crime. Such an enactment would not affect cases of ordinary endeavours to conceal birth, where no unfair means to prevent the child living are employed before, during, or after birth.

As to the mode in which the execution should be carried out, I cannot do better than refer to Fielding, who, in Chapter II. of the Causes of the Increase of Robbers (published in 1751, when he was a magistrate at Bow Street and presiding at the Middlesex Sessions), observes with reference to executions, "The design "of those who first appointed execution to be public was to add the punish- "ment of shame to that of death, in order to make the example an object of "greater terror. But experience has shown us that the event is directly con- "trary to this intention. Indeed, a competent knowledge of human nature "might have foreseen the consequence. To unite the ideas of death and "shame is not so easy as may be imagined, all ideas of the latter being "absorbed by the former."

He goes on to observe, "The great business is to raise terror," and "to strip "it of all pity and all admiration."

"To effect this, it seems that the execution should be as soon as possible "after the commission and conviction of the crime."

"It should be in some degree private." And here the author, in allusion to theatrical performances, says, "A murder behind the scenes will affect the "audience with greater terror than if acted before their eyes. Of this we have "an instance in the murder of the king in Macbeth, at which, when Garrick "acts the part, it is scarce an hyperbole to say I have seen the hair of an "audience stand on end."

"The execution should be in the highest degree solemn."

"If executions, therefore, could be so contrived that few could be present "at them, they would be much more shocking and terrible to the crowd "without doors than at present, as well as much more dreadful to the "criminals themselves."

I think it would be desirable in populous towns and cities, if not generally, that the execution should take place within the walls of the gaol, neither secretly nor privately, but in the presence of the sheriffs and their staff, with liberty to the members of the press generally to be present, and others who can be accommodated within the space allotted for execution. Upon the surgeon ascertaining the death, a jury upon view of the body should find their verdict to the effect that the sentence had been executed; in fact, within certain limits, I would make the execution as public as possible within doors, but followed by a subsequent public announcement to be placed conspicuously in all places of public resort.

Before I close these remarks, I may notice the difference in the effect of pronouncing a sentence of penal servitude for life or a long term of years and that of the extreme sentence of the law. I know nothing more solemn than the latter. It is felt by every one in court. A sentence of penal servitude, however, frequently excites an old offender to acts of violence. I can recollect more than one instance in which the prisoner has thrown his boot at a judge or witness, or, when he has had the means, a piece of coal or a stone, previously secreted on his person. In one case at Croydon, a man who had been sentenced to a lengthened period of transportation jumped from the dock on to the table, and was rushing towards the judge, Mr. Serjeant Taddy, when he was stopped by the police. Such exhibitions I have never known on capital convictions.

I may here add, in illustration of my previous remark, that the punishment of death when pronounced should be certain; that in my strong opinion the mode in which penal servitude is carried out has a prejudicial effect, from the uncertainty caused by the knowledge that the sentence far exceeds the punishment that the convict will have to undergo. This knowledge is obtained from no doubtful source, but, if I am not misinformed, from printed notices posted in conspicuous places within the prison. It is, I believe, well known that a convict dreads imprisonment for 18 months or two years with hard labour more than penal servitude for five or seven years, for this reason,—with the former there is no hope of remission, little or no variety in occupation, nor any change in the place of confinement; with the latter there is not only the hope, but the certainty of remission before the expiration of the nominal term, and probably variety of scene and employment. While referring to the subject of certainty, I hope to be pardoned for stating my conviction that if there were a positive fixed sentence, say six months with hard labour for small offences, the most salutary results would be obtained.

I regret to say that I have looked in vain for any argument which leads me to believe that at present the punishment of death for the crime of wilful and deliberate murder should be abolished. I will conclude with the words of Bradford, quoted in 1 Montagu, 275:—"It is possible that the further diffu-
" sion of knowledge and melioration of manners, may render Capital Punish-
" ments unnecessary in all cases; but until we have had more experience, it is
" safest to tread with caution on such delicate ground, and to proceed step by
" step in so great a work. A few years' experience is often of more real use
" than all the theory and rhetoric in the world."

I could have hoped that these observations had been more methodically arranged; however, should they contain nothing which has not yet been already suggested, it will be scarcely worth while to lay them before the Commissioners.

I have, &c.
JAMES HEMP,
Clerk to the Court for Crown Cases reserved.

J. H. Patteson, Esq.,
&c. &c. &c.

45, Parliament Street,
December 2, 1864.

DEAR MR. WADDINGTON,

I HAVE had a long discussion on the subject of Capital Punishment with the governor of Millbank, the chaplain, and the chief clerk, whose opinions are really worth having, and we came to the following conclusions:—

1. *Public* executions are much dreaded, and we regard them as likely to be more deterrent than if they were *private*.

2. Criminals deserving death generally are not likely to reform with ordinary opportunities, but they *do* repent before hanging.

3. Burglars, highwaymen, and garotters are frequently armed with weapons intending to give a *disabling* blow. Most of these would be deterred by fear of the gallows from giving a deliberate *deadly* blow, though they will fight their way out of a difficulty at all hazards. Much certainly depends on the *hardness* or otherwise of the man's mind. The *hard* man will face all consequences, and deal a death blow without consideration; the *softer* man (and the majority of

convicts are cowards at bottom) will be deterred, and probably when the fatal blow is about to be struck, by the apprehension of capital punishment.

4. No secondary punishment will deter under such circumstances.

5. As regards convicts in prison, if certain of them had not the fear of being hanged before their eyes, it would be found necessary to keep them so restrained as to turn them into wild beasts, lest they should assault the warders. Governors and prison officers in Millbank, Pentonville, Wakefield, and other prisons would be in daily danger of death, and the inevitable alternatives would be, the exercise of extreme brutality on the part of the warders in dealing with their prisoners, or extreme leniency—the officers would not *see* offences. How would it fare with officers in charge of men under life sentences, when all but a death punishment was exhausted?

We have no doubt whatever on this point. There are several of these men now in Millbank prison who would not hesitate to commit murder if not for the fear of being hanged. One man told *me* he was sorry he had not murdered me, as he fully intended when out of prison for a short time between one sentence and another; and I believed him.

We are quite sure that if Capital Punishment be abolished there will be an overpowering demand for its re-enactment before long.

I am,
Dear Mr. Waddington,
Yours faithfully,
D. O'Brien.

Answers to Question No. 25, circulated among the Judges by the Select Committee of the House of Lords, appointed to enquire into the Execution of the Criminal Law in the year 1847.

Question No. 25.

Do you think any punishment by transportation or by imprisonment would be a sufficient substitute for death in the cases still left capital?

Answers.

Lord Denman.—I have not sufficiently considered this question to offer any opinion upon it.

Mr. Justice Wightman.—There can be little doubt but that secondary punishment may be made so severe as to be a sufficient substitute for the punishment of death, provided such secondary punishment is invariably and inflexibly carried out; but whatever the substituted punishment may be, it must be fixed and certain, leaving no discretion to be exercised by the judge who passes the sentence.

Mr. Justice Erle.—I think the punishment of death should remain for crimes equivalent to murder.

I believe that the reluctance of the community against capital punishment for other crimes does not exist in respect of murder.

Lord Chief Baron Pollock and *Mr. Justice Coleridge.*—We think not. This is a question on which, within the limits we must confine ourselves to, it is impossible to state all the reasons for this opinion. We would only observe, that in the few cases which are still punishable with death we are by no means unfavourable to a reconsideration; and it occurs to us to suggest that in the case of arson, still punishable with death, it may be well to consider whether *knowledge* that some human being was in the house should not be made a condition.

Mr. Baron Parke and *Mr. Justice Patteson.*—We think it would be a dangerous experiment to substitute punishment by transportation or imprisonment for death; we will not say in all the cases still left capital, but in some. Imprisonment for life, abroad or at home, would be a punishment of great severity, if rigidly carried into effect; but it never would be.

The criminal condemned to perpetual loss of liberty, would, in the course of time, become an object of pity; and, the public sympathy being excited, the sentence would be ultimately remitted, and perpetual imprisonment would practically become temporary imprisonment, and have only the same preventive effect, whatever it may be, against crime, which that affords.

Punishment more severe than perpetual imprisonment, and short of the loss of life, such as torture and mutilation, the terror of which might perhaps operate as greatly in the prevention of crime as the fear of death, could never be substituted, for they would never be tolerated.

Mr. Justice Maule.—I had formed no opinion before the question reached me, and have not had time or means to form one since on this subject.

Mr. Justice Cresswell.—I believe that treason and murder are the only cases which are still *practically* capital; and as to them, I do not think that any punishment by transportation or imprisonment would be a sufficient substitute.

Mr. Baron Alderson.—I wish I could believe that the punishment of death could safely be dispensed with. It is at present practically confined to cases of murder. Whether all cases of murder require it, as, for instance, duelling and the like, is a doubt with me. That is an experiment which, I think, might safely be made. It is a bad thing to have verdicts continually given in the teeth of the law and the evidence.

Mr. Justice Coltman.—To the 25th question I am disposed to think that imprisonment for life, without hope of any remission of the sentence (unless the innocence of the accused should be made to appear), might be substituted without inconvenience for capital punishment. Many guilty persons now escape who would then be convicted; and though the punishment has little to excite apprehension, in comparison with that of death, to the majority of persons, I do not think that the apprehension of death operates much on the mind of a man who is meditating a great crime; he is generally, I conceive, under the dominion of some overpowering passion, which leads and enables him to set all consequences at defiance.

Mr. Baron Rolfe.—Capital punishment is now in practice confined to cases of murder; and in such cases I think it ought to be retained. I think it very important to leave to every criminal the strongest possible motive to abstain from murder in whatever crimes he may be engaged.

Mr. Baron Platt.—I think not. In some cases falling within any one of the classes of capital offences, the malignity, barbarity, or treachery of the offender in committing the offence, and other circumstances attending its commission, may, in order to deter others by a signal example, and give to the public adequate protection, demand the infliction of the highest penalty of the law. In the others the Crown mitigates the sentence.

Chief Justice Wilde.—Question 25 involves considerations much too grave to warrant a hasty opinion, however great the objections may be to the punishment of death, and, in my estimation, they are very great.

Chief Baron Pigott (Ireland).—My opinion is that there ought not to be a further removal of the punishment of death until there shall have been a larger experience, and a more satisfactory collection and classification of results, than have been yet had of the working of the existing law, and of the mitigated punishments which it now provides.

Lord Chief Justice Blackburn (Ireland).—I think it might. I should see no objection to such a substitution in all cases, except murder, conspiracy to murder, and crimes in which the intent to commit murder is of the essence of the charge.

Mr. Justice Perrin (Ireland).—I do. I would add, that the increased certainty of conviction and of some heavy punishment, though short of capital, which in Ireland especially, I think, would much more frequently ensue, must operate strongly. I am convinced that in many cases of murder, when juries

have either acquitted or not agreed in a verdict, the apprehension of taking away life where a mistake might by any possibility be made has been the cause, and that if the punishment had been short of death, convictions would have taken place.

Chief Justice Doherty (Ireland).—I do not think any punishment by transportation or by imprisonment would be a sufficient substitute for death in the cases which still remain capital. Adverting particularly to cases of offences against the person, I think that in the present state of society in Ireland, capital punishment has been as much diminished as it can be with safety.

Mr. Justice Torrens (Ireland).—No.

Mr. Justice Jackson (Ireland).—My opinion is that death should be the penalty for high treason and murder certainly, and I have serious doubts whether any further alteration should be now made in our laws on the subject of capital punishment. I am strongly of opinion that this extreme punishment will never be inflicted as the law now stands when the public safety and the interest of the community at large do not absolutely require it.

Baron Pennefather (Ireland).—With respect to capital punishment I do not think I could recommend its abolition in cases of murder.

Baron Lefroy (Ireland).—I do not.

Mr. Justice Burton (Ireland).—It does not appear to me that punishment by imprisonment or transportation would be a sufficient substitute for death in the cases still left capital.

Chief Baron Richards (Ireland).—I am of opinion that public executions ought not to be persisted in. They are, in my opinion, calculated to degrade and demoralize the people of the country. I am inclined to think that transportation, attended with the most stringent regulations to prevent intercourse between the criminals and their families, and all persons except the public functionaries or officers of justice, accompanied by the strictest regulations as to discipline, imposition of appropriate labour, and the like, might be substituted for the punishment of death in the cases left capital, but I cannot say that I have formed a very decided opinion on this subject; but I am very clearly of opinion that the punishment of death, if it shall be continued, ought to be inflicted in the presence of some responsible functionary or board, and with due security for its being carried out, and not in public as at present; and I am further of opinion that hanging is a very cruel method of taking away life, and should in any case be abolished.

The Lord Chief Justice General of Scotland.—I am very decidedly of opinion that no punishment but transportation or imprisonment would be a sufficient substitute for that of death in the cases still left capital. As to the total abolition of the punishment of death in regard to the crime of murder, amounting to an assurance that in however revolting a manner that crime might be perpetrated it could never lead to the forfeiture of the life of the murderer, the consequences to the public safety seem to be quite appalling. The present punishment of murder is sanctioned by the Laws of Almighty God, and has been adopted by those of most civilized nations, and I certainly think it would be unwise and dangerous to the best interests of society ever to abolish it. In regard to another offence, that of rape, as to which the capital punishment has been abolished in England, I have not learned that its frequency under the most aggravated circumstances has at all been diminished; while in Scotland, though no Statute has yet abolished its punishment by death, the probability or rather certainty that such a sentence would not be carried into execution has of late, according to my belief, rendered the crime more frequent. But upon this subject the other Judges are capable of giving more information.

The Lord Justice Clerk of Scotland.—The only case in which by the practice of Scotland (the Public Prosecutor now invariably restricting the punishment in the other cases in which the punishment remains nominally capital) the sentence of death is ever pronounced is for the crime of murder.

Since October 1841 there have been only three sentences of death pronounced in Scotland: One case not being yet disposed of by the Crown, having occurred only last week. The sentence has been remitted. For murder I am decidedly of opinion that there ought to be no other sentence than that of death, though there are cases in which even for murder the prerogative of the Crown may be wisely exercised.

Other cases remain nominally capital in Scotland, chiefly because our whole law of bail would require to be altered: bail in Scotland for ordinary offences being preposterously low. But for most grave crimes I am of opinion that the party ought to be detained and secured for trial, and that property ought not to have that mode of escaping from trial by forfeiting a bail bond.

Right Honourable C. Hope, late Lord Justice Clerk (Scotland).—I am not of opinion that any punishment by transportation or imprisonment would be a sufficient punishment as a substitute for death, in cases still left capital.

Lord Mackenzie (Scotland).—I cannot truly say I think imprisonment or even transportation would be a sufficient substitute for death in these cases, particularly in cases of murder, the only cases now of ordinary occurrence which remain capital in our practice. Death is, I think, still the "King of "Terrors" "ille timorum maximus," which almost all men fear who are not insane, and which those who do not fear must presently meet, and cease to live and do evil. One great objection to the punishment of death is, that it is irrevocable. But that very thing adds much to the terror of it. The infliction of death for murder adds, I think, horror to the crime of murder, as something inexpiable. The fear of it haunts the murderer's imagination. I do not think the fear of imprisonment or transportation would have the like effect.

Lord Cockburn (Scotland).—I do not. But in reference to Scotland I speak only of the cases that are capital in practice; because, as our law stands, there are a great many cases still left capital which are never prosecuted to that result. The law has not been (as it ought to be) authoritatively cleared of old capital punishments, which, though they still encumber our books, are abolished practically.

Lord Medwyn (Scotland).—I do not; and I lament that rape is no longer punished capitally, more especially when more than one man is aiding in the commission of the crime.

Lord Moncrieff (Scotland).—I must answer this question decidedly in the negative.

Lord Wood (Scotland).—I am of opinion that it could not. In consequence of rape being no longer a capital offence by the law of England, it may be said to have practically ceased to be so by the law of Scotland, a change which I, with the utmost deference, think is to be lamented; for to my mind it is a crime of that character for which generally (cases of exception from peculiarity of circumstances there may be) the last sentence of the law is the appropriate one, and which is not adequately punished even by transportation for life.

Extract from the Report of the Select Committee of the Lords on the Execution of the Criminal Law, 1847.

"Respecting the expediency of abolishing capital punishments, the Committee found scarcely any difference of opinion. Almost all witnesses and all authorities agree in opinion that for offences of the gravest kind the punishment of death ought to be retained."

EXTRACT from JUDICIAL STATISTICS of RETURNS for the YEAR 1856.

Sentence of death, 1856.

Sentences of death were passed upon 69 persons for the following offences. With the exception of the unnatural offences, they refer solely to murder or other felonies where the lives of persons were endangered by acts of great violence or atrocity.

Offences.	1856.
Murder	31
Attempts to murder, attended by dangerous bodily injuries	10
Sodomy	11
Burglary, with violence to persons	13
Robbery, attended with wounds	2
Arson of dwelling-houses, persons being therein	2
Total	69

Executions, 1856.

The executions in the cases of those convicted this year were nearly double the usual average. They include three foreigners convicted of a crime committed on the high seas, which can in nowise be deemed a part of the crime of this country though tried here. A fourth convict executed was also a foreigner; so that four of the sixteen persons executed were foreigners. In the previous year two of the seven persons executed were foreigners.

Cheshire.—William Jackson, aged 35. Murder of his two children, to relieve himself of the charge of them.

Cornwall.—William Nevan, aged 44. Murder by a soldier of his serjeant, from revengeful motives.

Dorset.—Elizabeth Martha Brown, aged 44. Murder of her husband, from jealousy and his ill-treatment of her.

Kent.—Dedea Redanies, aged 26. Murder, from jealousy, of a young female to whom he was attached, and also of her sister.

Leicestershire.—John Fowkes, aged 45. Murder of his nephew, supposed arising out of family quarrels relative to property.

Ditto. William Brown, aged 33. Murder of an aged man and his grandson, with intent to rob.

Middlesex.—William Bousefield, aged 29. Murder of his wife and three children.

Ditto. Joseph Jenkins alias Robert Marley, aged 39. Murder and robbery in a shop.

Southampton.—Thomas Jones, aged 46. Murder of the assistant surgeon of a convict hulk in which he was undergoing sentence.

Ditto. Guiseppe Lagava, aged 20; Giovanni Bartelano, aged 18; Matteo Pettrick, aged 21. Murder of two officers of a vessel on the high seas, and piracy.

Staffordshire.—William Palmer, aged 31. Murder by poison, to obtain property; also charged with the murder of his wife and his brother. Tried at the Central Criminal Court on removal by order of the Court of Queen's Bench under Stat. 19 Vict. c. 16.

Sussex.—John Murdock, aged 20. Murder of the keeper of a prison in which he was confined to effect his escape.

Yorkshire.—William Dove, aged 28. Murder of his wife by poison.

Ditto. John Hannah, aged 22. Murder, from jealousy, of a female with whom he had cohabited.

Commuted Punishments.

The remainder of the capital sentences in the year 1856 were commuted to the under-mentioned secondary punishments, which are shown in connexion with the offences for which the sentences were passed. The case of one prisoner convicted of murder stands respited for the decision of the Judges.

Offences.	Transportation.			Penal Servitude.			Imprisonment.	Total.
	Life.	Above 15 yrs.	15 & 14 yrs.	Life.	15 yrs.	6 & 4 yrs.		
Murder - - - -	11	1	—	2	—	—	—	14
Attempts to murder, attended by dangerous bodily injuries	8	1	—	—	—	1	—	10
Sodomy - - - -	3	—	2	—	2	4	—	11
Burglary, with violence to persons.	3	5	3	—	—	1	1	13
Robbery, attended by wounds	2	—	—	—	—	—	—	2
Arson of dwelling-houses, persons being therein.	—	—	—	—	—	1	1	2
Total - - -	27	7	5	2	2	7	2	52

Extract from Judicial Statistics of Returns for the Year 1857.

Capital Convictions.

The capital convictions decreased this year to the average of the years immediately preceding 1856. They were for the following offences, to each of which the decrease extended, except to the robberies which under this head are confined to the violent class which alone continues capital:—

Offences.	1857.	1856.
Murder - - - - - - - - -	20	31
Attempts to murder, attended by dangerous bodily injuries	9	10
Sodomy - - - - - - - -	10	11
Burglary, with violence to persons - - - -	6	13
Robbery, attended with wounds - - - -	7	2
Arson of dwelling-houses, persons being therein - -	2	2
Total - - - - - - -	54	69

Executions, 1857.

The executions this year (as in the previous sixteen years, with one exception,) were all for murder. Of the twenty persons convicted of this crime thirteen were executed; their names follow, with such brief particulars of the circumstances of their crimes as could be accurately ascertained. I cannot avoid the remark, which arises in going through these cases, upon what slight and sudden provocations such heinous crimes appear in five instances to have been committed, while in four cases (including two of the preceding) the murderer was under the influence of drink, and in two instances had been actually drinking with his victim. In four cases the wife of the murderer was his victim.

Cheshire.—John Blagg, aged 47. Murder of a gamekeeper by a poacher, supposed from revenge, not in an affray.

Essex.—Michael Crawley, aged 62. Murder of his wife, arising out of a sudden quarrel.

Charles Finch, aged 26. Murder of a young woman with whom he had cohabited, motive not very apparent.

Kent.—George Kebble Edwards, aged 18. Murder of his brother, supposed in his sleep, from revenge for having reproached him with his idle dissolute life.

George Bave, aged 26. Murder by a seaman in Her Majesty's service of a corporal of Marines, upon whose report he had been reduced.

Stephen Fox, aged 23. Murder, from passionate revenge, of a young female to whom he was engaged, on her discarding him for his improper conduct with another woman.

Lancaster.—Edward Hardman, aged 28. Murder of his wife, from a desire to marry another, and from religious differences.

Henry Rogers, aged 37. Murder by the master of a merchant ship of one of his crew by continued acts of barbarous treatment.

Middlesex.—Robert Thomas Davis, aged 40. Murder of his wife in a sudden paroxysm of drunken jealousy.

Somerset.—Thomas Nation, aged 22. Murder of a companion with whom he had been drinking, to rob him of five pounds.

John Beale, aged 30. Murder and robbery of a young woman with whom he had formerly lived as a fellow servant; having enticed her from her situation under pretext of marriage, but with the design to plunder her of her reputed savings.

Stafford.—George Jackson, aged 20. Murder and robbery committed under the influence of drink.

Glamorgan.—John Lewis, aged 39. Murder of his wife; supposed in an attempt to obtain the possession of half a sovereign, to continue a drunken fit.

To this list must be added the name of the following convict who was convicted in December 1856, but whose execution was respited (and did not take place till July 1857) for the opinion of the Court of Queen's Bench on a question of informality in empannelling the Jury, in the exercise of the Crown's power of challenge; and upon the affirmation of the conviction by the Court was again removed upon appeal to the Judges sitting in Error in the Court of Exchequer Chamber, who affirmed the judgment of the Court of Queen's Bench awarding execution.

Kent.—Thomas Mansell, aged 28. Murder by a private soldier of his corporal upon very groundless revenge, on small provocation.

Commuted Punishments.

In the remaining cases the capital sentences upon each of the offences were commuted to the following terms of secondary punishment:—

Offences.	Transportation.			Penal Servitude.					Imprisonment.	Total.
	Life.	Above 15 yrs.	15 & 14 yrs.	Life.	20 yrs.	15 yrs.	10 yrs.	6 & 4 yrs.		
Murder	—	—	—	7	—	—	—	—	—	7
Attempts to murder, attended by dangerous bodily injuries.	3	1	—	3	1	1	—	—	—	9
Sodomy	3	—	—	1	—	—	3	1	2	10
Burglary, with violence to persons.	3	—	—	1	1	—	1	—	—	6
Robbery, attended by wounds.	—	—	—	1	4	2	—	—	—	7
Arson of dwelling-houses, persons being therein.	—	—	—	1	—	1	—	—	—	2
Total	9	1	—	14	6	4	4	1	2	41

EXTRACT from JUDICIAL STATISTICS of Returns for the Year 1858.

Capital Convictions.

The capital sentences this year were for the following offences, which are placed in comparison with the previous years, and prove to what a very narrow range the sentence of death is now practically limited:

Offences.	1858.	1857.	1856.
Murder	16	20	31
Attempts to murder, attended by dangerous bodily injuries	8	9	10
Sodomy	14	10	11
Burglary, with violence to persons	13	6	13
Robbery, attended with wounds	2	7	2
Arson of dwelling-houses, persons being therein	—	2	2
Total	53	54	69

Executions.

Of the above fifty-three capital convicts in 1858, eleven were executed—in each case for Murder. They were all males, and four of them foreigners, making in the last three years eight foreigners out of the forty-one persons executed, or within a fraction of one in five. Their names and the circumstances which attended their crimes were:

Dorset.—James Seal, aged 19. Murder of a young girl. No sufficient motive appeared on the trial, but the convict confessed before his execution that

his victim had charge of a cottage which he had determined to burn down from revenge towards the owner, and that he murdered the girl to prevent her being a witness to his intended deed.

Lancaster.—Henry Reid, aged 40. Murder of his wife, after a quarrel, both parties being drunk.

Middlesex.—Giovanni Lani, aged 21. Murder of a prostitute in a brothel for the purpose of plundering her.

Somerset.—William Burgess, aged 43. Murder of his female child aged 6 years, to relieve himself of a charge of 2*s* 6*d.* per week for her maintenance.

——— John Baker Bucknell, aged 20. Murder of his grandfather and grandmother; supposed to rob the grandfather of a small sum of money, but the motive was not made apparent.

Suffolk.—Ebenezer Cherrington, aged 26. Murder, after a quarrel, of a married woman, with whom he had long had criminal intercourse.

Surrey.—Christian Sattler, aged 37. Murder from revenge of a police officer who had him in custody on a charge of theft. (The offence was committed on the high seas, and the execution took place in Middlesex.)

York.—Joseph Sheppard, aged 22. Murder and robbery.

——— John Taylor Whitworth, aged 22. Murder of his sweetheart of whom he was jealous, after making a violent attempt upon her virtue.

Glamorgan.—Maneli Zelephanti, aged 28, and Hanagador Alepsi, aged 23. Murder of a Greek sailor (their countryman) for the purpose of robbing him.

Commuted Punishments.

In the remaining capital convictions the sentences were commuted to the following terms of penal servitude:—

Offences.	Total.	Penal Servitude.							
		Life.	15 yrs.	14 yrs.	10 yrs.	8 yrs.	7 yrs.	6 yrs.	2 yrs.
Murder	5	5	—	—	—	—	—	—	—
Attempts to murder	8	6	1	1	—	—	—	—	—
Sodomy	14	4	4	—	2	1	1	1	1
Burglary, with violence to persons	13	13	—	—	—	—	—	—	—
Robbery and wounding	2	1	—	—	1	—	—	—	—
Total	42	29	5	1	3	1	1	1	1

Extract from Judicial Statistics of Returns for the Year 1859.

Capital Convictions.

For the last fifteen years the capital convictions have been confined to the six offences in the next Table, which practically represents the law of capital punishments. The maximum number in any year within the above period was the 70 convicted in 1851. Last year 52 only were sentenced to death. Thirty years previously, in 1839, 1,385 were so sentenced, and no less than 74 executed, 51 of whom were convicted of crimes not now capital.

Offences.	1859.	1858.	1857.	1856.
Murder	18	16	20	31
Attempts to murder, attended by dangerous bodily injuries	6	8	9	10
Sodomy	19	14	10	11
Burglary, with violence to persons	7	13	6	13
Robbery, attended with wounds	1	2	7	2
Arson of dwelling-houses, persons being therein	1	—	2	2
Total	52	53	54	69

Executions, 1859.

The extreme penalty of the law was inflicted in nine of the above convictions in the year 1859, all of them murders without any extenuating circumstances which could be admitted as a ground for mercy. The particulars of these cases were:—

Durham.—John Shafto Witthew, aged 55. Murder of his wife on a vague suspicion of jealousy, apparently quite unfounded.

Kent.—Frederick Prentice, aged 20. Murder, from revenge, of a young girl who rejected his love.

Lincoln.—Henry Carey, aged 24, and William Pickett, aged 20. Murder, with great brutality, and robbery.

Middlesex.—Samuel Adams, aged 35. Murder of his wife's sister on her expressing her determination not to disclose the abode of his wife, who had left him from his ill-usage.

Monmouth.—Matthew Francis, aged 26. Murder of his wife, who from his ill-treatment had abandoned him, on her refusing to return to him.

Warwick.—John Kington, aged 22. Murder of his wife, who had abandoned him, on her refusal to return with him.

York.—John Riley, aged 36. Murder of his wife, who had left him from ill-usage, on his renewing intercourse with her, while she was leading a dissolute life.

York.—Charles Normanton, aged 18. Murder and robbery.

Commuted Punishments.

The following commuted punishments were, by pardons from the Crown, substituted for the capital punishment in the remaining cases:

Offences.	Total.	Penal Servitude.							Reformatory, 5 yrs.	Free Pardon.
		Life.	20 yrs.	15 yrs.	10 yrs.	8 yrs.	6 yrs. & above 3.	3 yrs. & under.		
Murder	9	8	—	—	—	—	—	—	—	1
Attempts to murder	6	2	—	2	1	—	—	1	—	—
Sodomy	19	3	1	2	1	1	6	5	—	—
Burglary, with violence to persons.	7	—	2	—	2	—	2	1	—	—
Robbery and wounding	1	—	—	—	—	—	1	—	—	—
Arson of dwelling, endangering life.	1	—	—	—	—	—	—	—	1	—
Total	43	13	3	4	4	1	9	7	1	1

Extract from Judicial Statistics of Returns for the Year 1860.

Capital Convictions.

The capital convictions in 1860 were only 48, the smallest number yet recorded. Of these 17 were for murder, being one less for this crime than in the preceding year.

The following table gives the number of convictions, for each of the last ten years, for each of the crimes now liable to capital punishment. The average of the capital convictions for these years is 56.

Offences.	1860.	1859.	1858.	1857.	1856.	1855.	1854.	1853.	1852.	1851.
Murder	17	18	16	20	31	11	11	17	16	16
Attempts to murder, attended by dangerous bodily injuries	9	6	8	9	10	10	7	8	11	6
Sodomy	12	19	14	10	11	20	15	9	14	18
Burglary, with violence to persons.	6	7	13	6	13	2	4	6	13	15
Robbery, attended with wounds.	3	1	2	7	2	5	7	14	5	13
Arson of dwelling-houses, persons being therein.	1	1	—	2	2	2	5	1	2	2
Total	48	52	53	54	69	50	49	55	61	70

The extreme penalty of the law may, however, be considered as virtually confined to murder, no execution having taken place for any other crime since the year 1841. The case which occurred in that year was for an attempt to murder, where life was seriously endangered.

Executions, 1860.

In 1860, in 12 of the capital convictions executions followed, all being cases of murder without any ground upon which mercy could be extended to the criminals. The particulars of the cases were as follows:—

Bedford.—Joseph Castle, aged 24. Murder of his wife under excitement occasioned by unfounded jealousy and suspicion of her.

Cumberland.—George Cass, aged 25. Murder of a female fellow servant, from apparently trifling provocation.

Durham.—Milner Lockey, aged 58. Murder of a man from jealousy with regard to his wife towards him.

Durham.—Thomas Smith, aged 35. Murder of a man, with whom he had been drinking, for the sake of robbing him.

Lancashire.—Thomas Gallagher, aged 40. Deliberate murder of his wife.

Middlesex.—James Mullins, aged 52. Murder of an old woman, of penurious habits, who lived alone, for the sake of robbing her.

Nottingham.—John Fenton, aged 37. Murder, with great brutality, for the sake of robbing his victim of money which he had seen him receive.

Southampton.—James Johnson, aged 25, a soldier. Murder of his corporal and serjeant from a vindictive feeling towards the former who had slightly reproved him.

Stafford.—Samuel Twigg, aged 35. Unprovoked murder of his wife, when he was under excitement from drink.

Surrey.—William Godfrey Youngman, aged 25. Murder of a young woman, with the supposed expectation of obtaining at her death the money for which her life was insured.

Warwickshire.—Thomas Price, age 24. Murder of a young woman to whom he had paid his addresses, but who refused to receive him any longer.

Wilts.—Serafin Monzano, aged 29, a Spaniard, a deserter from the Spanish army. Murder of an old woman, the wife of a labourer, to prevent discovery of a robbery which he had committed in her house.

Commuted Punishments.

The following commuted punishments were, by pardons from the Crown, substituted for the capital punishment in the remaining cases:—

Offenders.	Total.	Penal Servitude.						Twelve Months imprisonment with hard Labour.	Free Pardon.
		Life.	20 yrs.	15 yrs.	10 yrs.	6 yrs. & above 3.	3 yrs. & under.		
Murder	5	4	—	1	—	—	—	—	—
Attempts to murder	9	6	—	1	—	1	—	1	—
Sodomy	12	—	—	—	3	4	4	—	1
Burglary, with violence to persons	6	2	2	—	—	2	—	—	—
Robbery and wounding	3	—	—	—	—	2	1	—	—
Arson of dwelling, endangering life	1	—	—	—	—	1	—	—	—
Total	36	12	2	2	3	10	5	1	1

Extract from Judicial Statistics of Returns for the Year 1861.

Capital Sentences.

Although the number of capital sentences in 1861 exceeded by two the number in 1860, their proportion per cent. to the total convictions is less for the former year than for the latter, viz., 0·36 (or reckoning three additional convictions as adverted to farther on, 0·38) in 1861; 0·39 in 1860.

Capital Convictions. Alteration of the law.

The next following table has hitherto represented the crimes, which since the year 1845 have been liable to capital punishment. Since the statutes passed in 1861 for the consolidation of the criminal law have been in operation, by which so many former Acts and parts of Acts have been repealed, treason and murder remain the only crimes for which sentence of death can now be legally pronounced. As these statutes came into operation only on the 1st November 1861, and special provision is made, that offences committed previously to that date should be dealt with as if the former Acts had not been repealed, few of the cases included in the present statistics can have been tried subject to the new law. Three cases, however, tried at the late winter assizes, the crimes having of course been committed subsequently to the 31st October, will be found in the table p. 45; one for an attempt to murder and two for unnatural offences, for which sentences of penal servitude were passed; but which under the former state of the law would have been subject to sentence of death. These cases, had the change in the law not taken place, would have raised the number of capital sentences for the year 1861 to fifty-three. Of the

fifty capital convictions, twenty-six only were for murder. The remaining twenty-four were consequently (none of them being for treason) for crimes which, had they been committed subsequently to the 31st October, could not have received capital sentence.

The crimes for which the capital sentences were passed, with the number of convictions for each crime, are shown below, for 1861 in comparison with each of the nine preceding years.

Offences.	1861.	1860.	1859.	1858.	1857.	1856.	1855.	1854.	1853.	1852.
Murder - - - -	26	17	18	16	20	31	11	11	17	16
Attempts to murder, attended by dangerous bodily injuries	5	9	6	8	9	10	10	7	8	11
Sodomy - - - -	10	12	19	14	10	11	20	15	9	14
Burglary, with violence to persons.	3	6	7	13	6	13	2	4	6	13
Robbery, attended with wounds.	5	3	1	2	7	2	5	7	14	5
Arson of dwelling-houses, persons being therein.	1	1	1	—	2	2	2	5	1	2
Total - - -	50	48	52	53	54	69	50	49	55	61

Executions, 1861. In fifteen of the capital convictions, two being for the same murder, the sentence of death was carried into execution. Fourteen of these convictions were for murder, and one for a very brutal attempt to murder, in which however, the intended victim escaped death, and was the means of convicting her assailant. This, the last execution which will take place where murder has not been accomplished, is the only case that has occurred for one and twenty years, in which the extreme penalty of the law has been inflicted for any crime but murder.

The following are the particulars of the different cases.

Cambridgeshire.—Augustus Hilton, aged 28. Murder of his wife by cutting her throat after a quarrel.

Cheshire.—Martin Doyle, aged 26. Attempt to murder a woman with whom he cohabited; having broken her head in a brutal manner with a stone.

Derbyshire.—George Smith, aged 20. Murder of his father by shooting him with a pistol, from a vindictive feeling for his having reproved him for his evil course of life.

Devonshire.—Robert Hackett, aged 29, a soldier. For the murder of his serjeant after a quarrel when intoxicated.

Kent.—Peter Masterson, aged 22, a soldier in the Artillery. Murder of a serjeant by striking him on the head with a poker, in revenge for his having been punished through the serjeant's instrumentality.

Lancashire.—Patrick McCaffrey, aged 20, a soldier. For shooting the Colonel and the Adjutant of his regiment, out of revenge against the latter for having punished him.

Middlesex.—William Cogan, aged 30, a labourer. For murder of his wife in a quarrel, when both were drunk.

Somersetshire.—Matthew Wedmore, aged 31, and Charles Wedmore, aged 22, brothers; the former a labourer, the latter a mariner. Murder of their great uncle, after plundering his house.

Southamptonshire.—Thomas Jackson, aged 19, a soldier. Murder of his serjeant by shooting him, in consequence of a grudge he had conceived against him.

Staffordshire.—David Brandrick, aged 20. Convicted with two others, whose sentences were commuted to penal servitude, for the murder of a man whose house they had broken into and robbed.

Warwickshire.—John Thompson, aged 35. Murder of a woman with whom he was in company in a brothel, supposed in consequence of a quarrel between them.

Warwickshire.—William Beamish, aged 45, a weaver. For poisoning his wife and child with arsenic, without apparent motive; he had intrigued with his servant.

Yorkshire.—James Waller, aged 31, a poacher. For murder of a gamekeeper by shooting him, apparently not in a struggle with him.

Brecknockshire.—William Williams, aged 19. For murder of his aunt by shooting her in expectation of succeeding to her property.

In the thirty-five remaining cases, the following commuted punishments were substituted by conditional pardons from the Crown for the capital sentences. Commuted Punishments.

Offences.	Total.	Penal Servitude.						Twelve Months Imprisonment with Hard Labour.
		Life.	20 yrs.	12 yrs.	10 yrs.	6 yrs.	3 yrs.	
Murder	12	11	—	—	—	—	—	1
Attempts to murder	4	3	—	1	—	—	—	—
Sodomy	10	1	—	—	4	1	4	—
Burglary, with violence to persons	3	—	1	—	1	—	1	—
Robbery and wounding	5	—	1	1	—	2	1	—
Arson of dwelling, endangering life	1	1	—	—	—	—	—	—
Total	35	16	2	2	5	3		1

For future years the foregoing table would be applicable only to cases of murder, as the other offences named are no longer capital.

EXTRACT from JUDICIAL STATISTICS of Returns for the Year 1862.

Consequent upon the change made by the Statutes passed in 1861 for the consolidation of the Criminal Law, the capital sentences have fallen for 1862 to little more than half (53·7 per cent.) of the average for the ten preceding years. At the same time, on a comparison with the four preceding years, during which transportation has ceased as a sentence, a considerable increase is observable in the number of sentences to penal servitude for life, and for the long periods generally. The sentences to penal servitude in 1862 number 3,167; they are in the proportion of 20·6 per cent. to the total convictions for that year. The average number for the four preceding years is 2,242. This number is, to the average of the convictions for those years, in the proportion of 17·3 per cent.

Although murder is the only crime now subject to capital punishment (with the exception of treason, for which no trial has taken place for many years), the following table, which has usually been given, will still be useful, in order to show the crimes which, since 1861, have ceased to be capital, and the number of capital sentences for each, as well as of those for murder in recent years.

The numbers for each year since 1853 inclusive, are—

Offences.	1862.	1861.	1860.	1859.	1858.	1857.	1856.	1855.	1854.	1853.
Murder	28	26	17	18	16	20	31	11	11	17
Attempts to murder, attended by dangerous bodily injuries	1	5	9	6	8	9	10	10	7	8
Sodomy	—	10	12	19	14	10	11	20	15	9
Burglary, with violence to persons.	—	3	6	7	13	6	13	2	4	6
Robbery, attended with wounds.	—	5	3	1	2	7	2	5	7	14
Arson of dwelling-houses, persons being therein.	—	1	1	1	—	2	2	2	5	1
Total	29	50	48	52	53	54	69	50	49	55

In one of the 29 capital cases in 1862, the crime was an attempt to murder; but having been committed in June 1861, previously to the consolidation statutes coming into operation, the conviction, which did not take place

until March 1862, was subject to the old law, and sentence of death was passed.

In 16 of the cases the law was left to take its course. One of the convicts, however, on the morning of his intended execution, contrived to commit suicide; 15 were executed. The particulars of these cases were as follows:—

Berkshire.—John Gould, labourer, aged 39. When drunk, he cut the throat of his little daughter. Insanity was pleaded.

Cornwall.—John Doidge, aged 28. Murder of an old man in his house, by striking him on the head with a bill-hook.

Cumberland.—William Charlton, aged 32, an engine driver. For the murder and robbery of an old woman, who lived in a cottage near the railway, and attended to the gates and night lamps.

Derbyshire.—Richard Thorley, aged 26, a labouring artizan. Through jealousy, he cut with a razor the throat of a girl to whom he was paying his addresses.

Durham.—John Cox, aged 25, a labouring Irishman. Convicted with his wife (who was respited, being with child,) of the murder of an old woman who lived next door to the murderers. The supposed motive was robbery.

Lancashire.—William Robert Taylor, a provision dealer, aged 37. For the murder of a house agent for a grudge he bore him, for not repairing the premises he occupied, to which cause he attributed the death of one of his children, from the bursting of a boiler.

Lancashire.—John Ward, aged 36, bricklayer. Convicted with another man, who was sentenced to penal servitude for life. They formed part of a gang of Union men, who, being detected in destroying non-union bricks, attacked two constables, one of whom they shot.

Lancashire.—Thomas Edwards, butcher, aged 32. For the murder of a prostitute with whom he had been living, by stabbing her with a knife, through drink and jealousy.

Middlesex.—Catherine Wilson, widow, aged 40. For poisoning her landlady in order to get possession of 9*l.* It was believed that she had previously poisoned four other persons, two of them being men with whom she was living.

Middlesex.—Robert Cooper, aged 32, a deserter from the army. His wife being still alive, he married another woman, who on making the discovery left him and went to live with her parents. He followed her about, and imagining that she had formed a connexion with another man, he shot her through the head with a pistol.

Southamptonshire.—George Jacob Gilbert, labourer, aged 30. He drowned or strangled in a ditch, on a Sunday morning, the daughter of a respectable farmer, after attempting to violate her. He had been before convicted of rape.

Southamptonshire.—Fernando Petrina, aged 26, a Spanish sailor on board the Brigantine Winthorpe. Murder of the captain and his wife, and the first mate. The motive not apparent.

Warwickshire.—George Gardner, aged 21. For shooting his fellow-servant. He had attempted to take liberties with her, and she had complained to her master.

Worcestershire.—William Ockold, aged 69, a tailor. For the murder of his wife by striking her on the head with a broomstick, in anger at being disturbed by her in the night.

Anglesey.—Richard Rowlands, aged 45, a labourer. He had married a widow with several children, but did not live in the same house with her. Her father, an old man of 70, was found murdered, and circumstances threw suspicion on Rowlands. There was no apparent motive.

Lancashire.—Walker Moor, aged 36, a tailor. Murder of his wife by cutting her throat with a razor. She had left him, and had gone to live with her uncle, with whose son her husband suspected her of intriguing. This man committed suicide shortly before the hour fixed for his execution.

Commuted sentences.

In the remaining cases, the capital sentences were commuted as follows:—Eleven, including the attempt to murder, to penal servitude for life, one to 12 months imprisonment, and one sent to Bethlem Hospital.

Extract from Judicial Statistics of Returns for the Year 1863.

Capital convictions.

The capital convictions, now confined to the crime of murder, were equal in the two years 1862 and 1863; in the former year, however, one of the convictions was for an attempt to murder, the crime having been committed previously to the statute of 1861 having come into operation. The convictions for murder in 1863, therefore, exceeded by one the number in 1862. Their proportion to the total convictions was, however, slightly lower in 1863 than in 1862, viz. 0·183 in the former year, 0·188 in the latter.

The following Table shows the number of capital convictions in each of the last 10 years, and the crimes which up to 1862 were subject to capital sentence.

Offences.	1863.	1862.	1861.	1860.	1859.	1858.	1857.	1856.	1855.	1854.
Murder - - - -	29	28	26	17	18	16	20	31	11	11
Attempts to murder, attended by dangerous bodily injuries	—	1	5	9	6	8	9	10	10	7
Sodomy - - - -	—	—	10	12	19	14	10	11	20	15
Burglary, with violence to persons.	—	—	3	6	7	13	6	13	2	4
Robbery, attended with wounds.	—	—	5	3	1	2	7	2	5	7
Arson of dwelling-houses, persons being therein.	—	—	1	1	1	—	2	2	2	5
Total - - -	29	29	50	48	52	53	54	69	50	49

Result of the convictions.

In 1863 the capital sentence was carried into effect upon 22 of the convicts. In seven cases the sentence was commuted to penal servitude for life. In 1862 16 convicts were left for execution; one of the number committed suicide.

Executions.

The following are the particulars of the cases of those who were executed in 1863:—

Cambridgeshire.—John Green, aged 25, labourer in a malting house. Murder in a drunken rage of a woman of loose character, whose body he partially burned in the malting room.

Cheshire.—Alice Hewitt or Holt aged 27, factory worker. Murder of her mother by poisoning with arsenic, with a view of obtaining from an allowance office a sum for which she had fraudulently insured her mother's life.

Dorset.—Charles Fooks, farmer, aged 49. Murder, by shooting a neighbouring farmer, with whom he had been on bad terms.

Herefordshire.—William Hope, agricultural labourer, aged 29. Murder of a servant girl of 16 years of age, by strangling her, after having committed a rape upon her.

Kent.—Robert A. Barton, aged 18. Murder of a boy of 10 years of age, by cutting his throat, without apparent motive.

Kent.—Alfred Holden, soldier of the artillery, aged 25. Murder of his child, by cutting its throat, after a quarrel with his serjeant, on the ground that he was tired of life and did not wish to leave the child as a burden to his wife.

Kent.—Alfred Eldridge, labourer, aged 33. Brutal murder of a baker to whom he owed money.

Liverpool.—Duncan McPhail, aged 34, and George Woods, aged 45; McPhail, a labourer; Woods had been 12 years in the army and had borne a good character. With two others, one of whom died in prison, the other turned approver, they broke into the house of a woman of 73 years of age, robbed her, and treated her with so much violence that she died.

Liverpool.—José Maria Alvarez, aged 22, a Spanish sailor. Murder of a man with his knife, on slight provocation, in the street.

Liverpool.—Benjamin Thomas, aged 24, a sailor. Murder of a woman, the keeper of a lodging house in which he was staying, with a potato-masher, on a trifling quarrel.

Liverpool.—John Hughes, shoemaker, aged 51. Murder of his wife by a savage assault upon her, when he was in a state of excitement from excessive drinking; he had habitually ill-treated her.

Liverpool.—James O'Brien, aged 26, a sailor. Murder of a woman, the keeper of a brothel in which he had been robbed, by stabbing her with a knife.

Liverpool.—Luke Charles, police constable, aged 29. Murder of his wife by drowning in a canal, with a view of marrying another woman.

Middlesex.—Joseph Brooks, aged 25, labourer. Murder, by shooting him, of a policeman, by whom he was suspected of stealing wood.

Newcastle-on-Tyne.—George Vass, aged 19. Murder of a woman of 50 years of age, with great brutality, after committing a rape upon her.

Oxfordshire.—Noah Austin, aged 19, butcher. Murder of an old farmer by shooting him with a pistol. Apparent motive, cupidity, and ill will at not being approved as a suitor for the old man's daughter.

Shropshire.—Edward Cooper, aged 30. Murder of his son, a deformed boy of 8 years of age, whom he strangled and buried in a copse, being tired of maintaining him.

Suffolk.—John Ducker, aged 63. Murder of a police constable, by whom he was detected carrying off stolen hay.

Surrey.—Samuel Wright, bricklayer, aged 31. Murder, on slight provocation, of a woman with whom he cohabited, by cutting her throat.

Warwickshire.—Henry Carter, aged 20. Murder of his sweetheart, a girl of 17 years of age, by shooting her with a pistol, apparently through jealousy.

Edwin Alfred Preedy, aged 20, a convict in Portland Prison. Murder of a warder of the prison, by stabbing him with a knife.

Sentences commuted.

The seven cases in which the capital sentences were commuted were the following:—

Derbyshire.—George Victor Townley, aged 25, an educated man, the son of a cotton manufacturer. Murder of a young woman by whom his addresses were rejected by cutting her throat.

Lancashire.—Levi Taylor, aged 18, a youth in a respectable position. He had married a prostitute by whom he was deserted. Finding her acting as a barmaid in a low description of beer house he cut her throat.

Liverpool.—Elizabeth Benyon, aged 17. Murder of her child aged one year, by drowning in a canal. She had been forced by her father to have incestuous intercourse with him, and he had afterwards turned her and her child into the street.

Surrey.—Joseph Mahaig, serjeant in the army, aged 28. Murder of a girl whom he had seduced, and who took poison with his knowledge or was given it by him.

Westmoreland.—Ann Pattinson, aged 19. Murder of her illegitimate child.

York.—John Gair, a military pensioner, aged 53. He cut the throat of a woman with whom he was living, (it was uncertain whether they were married or not,) from jealousy and a suspicion of her being unfaithful. He afterwards attempted suicide. The woman was of drunken habits and gave great provocation.

Yorkshire.—Patrick Hurley, labourer, aged 25. Murder, by stabbing with a knife, of a bystander who expostulated with him when engaged in a drunken riot.

The following Presentments from the Grand and Petty Jurors respectively for the Southern Division of the County of Lancaster, have been forwarded by Sir George Grey to the Capital Punishment Commissioners.

To the Honorable Sir Gillery Pigott, Kt., Her Majesty's Judge of Assize presiding in the Criminal Court at the Assizes holden at Manchester for the Southern Division of the County of Lancaster, on the 26th day of July 1864.

The Presentment of the Grand Jurors at the said Assizes, setteth forth,—

That they deem this the first occasion of holding a Criminal Assize for the Hundred of Salford, to be a fitting opportunity to present to your Lordship the importance and desirability of making an early change in the mode of carrying out Capital Punishment. That they consider such change to be desirable on account of the pernicious and demoralizing effects which public executions have upon those large masses of the people who from time to time congregate to witness them. That, having in view those effects, and taking into consideration the large population resident in this district, they are impressed with the inexpediency of carrying out Capital Punishment in public, and are convinced that great advantage would result if the law was so altered as to permit executions to be carried into effect, under proper regulations and securities for the due fulfilment of the sentence, within the respective prisons of the United Kingdom.

And the Jurors aforesaid respectfully desire your Lordship to forward their said presentment to the Rt. Hon. Sir George Grey, Bt., M.P., Her Majesty's Principal Secretary of State for the Home Department.

ALGERNON EGERTON, Foreman.

To the Honorable Sir Gillery Pigott, Kt., Her Majesty's Judge of Assize holden at Manchester for the Southern Division (Salford Hundred) of the County of Lancaster.

The Presentment of the Petty Jurors at the said Assizes, setteth forth,—

That they cannot separate without cordially endorsing the presentment made by the Grand Jury on the 29th instant, on the subject of Capital Punishment.

Believing that Capital Punishment is mainly intended as a preventive of crime, they consider that so far from answering that end, it positively increases crime; that so far from acting as a warning the scenes occurring at public executions, show just the reverse; and while reserving the expression of any opinion as to the expediency of Capital Punishment at all, they embrace this opportunity of saying that they consider that justice would be satisfied and a great scandal removed were the executions of criminals to take place within the prison walls.

And the Jurors aforesaid respectfully ask your Lordship to forward this presentment to Sir George Grey, Bart., Her Majesty's Secretary of State for the Home Department.

EDMUND WORTHINGTON MEARS.
WILLIAM ROBINSON.
JOHN R. COOLEY.
JOHN WALKER.
WILLIAM MOORE.
CHARLES FLETCHER.
THOS. PILLING.
JOHN BAILEY.
GEORGE HARDMAN.
WM. HUNT.
JOSH. MOUNCEY.
HENRY BROOKE.
GEORGE LEE.
WILLIAM PIKE.
EDWARD T. MOLINEAUX.
WILLIAM GASENLY.
ROBERT MEEK.
ROBT. SCHOFIELD.
JOHN CROOK.
PETER WHITEHEAD.
JOSEPH WALKER.
THOMAS RASHWORTH.

NUMBER of CAPITAL SENTENCES, and NUMBER of EXECUTIONS, in each year since 1823, inclusive, &c.

IN the year 1832 Capital Punishment was abolished for cattle stealing, horse stealing, sheep stealing, larceny to the value of 5*l.* in a dwelling house, coining, and forgery (except of wills and powers of attorney to transfer stock); and the effect is apparent in the decrease in the number of capital sentences from 1,449 in 1832, to 931 in 1833. It was further abolished in 1833, for housebreaking; in 1834, for returning from transportation; and in 1835 for sacrilege, and letter stealing by servants of the Post Office; and in consequence a further great decrease is shown in the number sentenced to death in 1834–35–36 and 1837.

By the Acts passed in 1837 (1 Vict.), the offences subject to Capital Punishment were virtually reduced to the following:—Murder, and attempts to murder; rape, and carnally abusing girls under 10 years of age; unnatural offences; burglary with violence to persons; robbery attended with cutting or wounding; arson of dwelling houses; endangering the lives of persons being therein. It remained also for treason; piracy where murder was attempted; showing false signals to cause shipwreck; setting fire to Her Majesty's ships of war; riot and feloniously destroying buildings; and embezzlement by servants of the Bank of England. But these latter offences are of rare occurrence.

Following the passing of these Acts the number of capital sentences fell to 116 in 1838, and to 56 in 1839. In 1841 (4 & 5 Vict.) it was further abolished for rape, &c., embezzlement, &c., and riot, &c. The average number of capital sentences for the following years, from 1840 up to 1861 inclusive, amounts only to 59·5.

Under the Acts passed in 1861 for the consolidation of the criminal Statutes, murder and treason alone remain subject to capital sentence; and the capital convictions in each of the years 1862 and 1863, have been 29 (one in 1862 having been for an attempt to murder, committed before the Acts of 1861 came into operation).

STATEMENT of the Number of Persons Sentenced to Death for Murder; of the Total Number Sentenced to Death; of the Number Executed for Murder; and of the Total Number Executed, in each year since 1823, inclusive; with the Average of the Numbers for each period of ten years, 1823–32, 1833–42 1843–52, 1853–62, and the Numbers for 1863, with the proportion of the Average Numbers to the Population for each period of ten years.

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1823	12	968	10	54
1824	17	1,066	15	49
1825	12	1,036	10	50
1826	13	1,203	10	57
1827	12	1,526	11	70
1828	20	1,165	18	59
1829	13	1,384	13	74
1830	16	1,397	14	46
1831	14	1,601	12	52
1832	20	1,449	15	54
Average of the 10 Years	14·9	1,279·5	12·8	56·5
Proportion of the average to Population	one in 863,234	one in 10,123	one in 996,039	one in 229,177

Year.	Sentenced to Death		Executed	
	For Murder.	Total Number.	For Murder.	Total Number.
1833	9	931	6	33
1834	13	480	12	34
1835	24	523	21	34
1836	20	494	8	17
1837	11	438	8	8
1838	25	116	5	6
1839	12	56	10	11
1840	18	77	9	9
1841	20	80	9	10
1842	16	57	9	9
Average of the 10 Years	16·8	325·2	9·7	17·1
Proportion of the average to Population	one in 887,230	one in 45,834	one in 1,536,646	one in 813,185
1843	22	97	13	13
1844	21	57	16	16
1845	19	49	12	12
1846	13	56	6	6
1847	19	51	8	8
1848	23	60	12	12
1849	19	66	15	15
1850	11	49	6	6
1851	16	70	9	10
1852	16	61	9	9
Average of the 10 Years	17·9	61·6	10·6	10·7
Proportion of the average to Population	one in 945,300	one in 274,692	one in 1,596,309	one in 1,581,390
1853	17	55	8	8
1854	11	49	5	5
1855	11	50	7	7
1856	31	69	16	16
1857	20	54	13	13
1858	16	53	11	11
1859	18	52	9	9
1860	16	48	12	12
1861	26	50	14	15
1862	28	29	15	15
Average of the 10 Years	19·4	50·9	11·	11·1
Proportion of the average to Population	one in 979,222	one in 373,220	one in 1,726,992	one in 1,711,434
1863	29	29	22	22

N.B.—The Proportion to Population is calculated on the mean numbers of two Censuses for each period, 1821 and 1831, 1831 and 1841, 1841 and 1851, 1851 and 1861.

In 1855, one; in 1856, four; in 1858, three; and in each of the years 1860, 1862, and 1863, one of the numbers convicted of Murder were Foreigners.

Home Office, 22nd November 1864.

Cases referred to by the Hon. Geo. Denman in his Evidence.

Martha Prior, Chelmsford Spring Assizes, 1848. Tried for murder of her female child, 13 days old.

In this case the surgeon gave it as his opinion that the crime was committed under a sudden and uncontrollable impulse, and the Judge remarked thereon, "Do you call it a sudden impulse of the mind when a person deliberately asks "for the child, and suffers a quarter of an hour to elapse before she asks for "the razor by which the fatal injury is deliberately inflicted?"

Verdict, not guilty, on the ground of insanity.

Joseph and *George Coe*, Maidstone Summer Assizes, 1848.

The coroner's inquisition having charged the prisoners with manslaughter only, Mr. Justice Coltman pointed out to the grand jury that the facts, as stated on the depositions, pointed to murder as the proper finding, and he ordered a bill for murder to be preferred, which was found. The prisoners were two seafaring men, who, having left their ship, were behaving noisily on shore in a town of Kent, in which they were liable to be apprehended by a constable for their proceedings. A constable having come, and attempted to take one of them into custody, the other attacked him, and treated him with sufficient violence to enable his companion to escape. The constable, owing to a fall, or a blow, not intended to kill him, and which took place while struggling with *both*, died. The learned Judge told the jury that they were bound to find the prisoners guilty of murder, and there was no ground for reducing the offence to manslaughter.

The prisoners were acquitted.

John Ager, Chelmsford Spring Assizes, 1850. Charged with murder.

The evidence showed great deliberation.

Verdict, manslaughter; transportation for life.

John Payne, Lewes Summer Assizes, 1851. Case of a boy of 11 years of age, charged with murder by stabbing very deliberately, which was proved.

Verdict, manslaughter.

——— *Harrington*, Chelmsford Spring Assizes, 1852. Tried for the murder of Elizabeth Cobb.

Acquitted.

James Beek and two others, Herts Spring Assizes, 1853. Tried for the capital offence of shooting with intent to murder.

Mr. Chambers (the present Common Serjeant) made a powerful speech for the prisoners, in which, as the Report says, "the principal endeavour was to "rescue them from a conviction of the capital charge."

Coleridge, J. summed up, and the jury immediately returned a verdict of "guilty, with intent to do grievous bodily harm." The Judge in passing sentence said, "they ought to feel very grateful for the merciful view the jury "had taken. If they had come to a more harsh conclusion, no one in that "Court could doubt that the evidence would quite have justified them." He then sentenced them to 15 years transportation.

Notes of Cases tried on the Home Circuit during the Years 1846–1853, in which Verdicts of Acquittal or Manslaughter were, in my opinion, due to Capital Punishment (not including ordinary Charges of Infanticide).

Levi Warman, tried at Chelmsford Spring Assizes, 1846, for murder of his wife. Found guilty of *manslaughter*.

20 years' transportation.

Sarah Chesham, tried at Chelmsford Spring Assizes, 1847, for murder of her son.

Acquitted.

Tried again at the same assizes for the murder of another son.

Acquitted.

N.B.—She was then put on her trial for the murder of another child, but the evidence was not sufficient to have justified a conviction.

TOTAL NUMBER of all the TRIALS for MURDER attended by me on the Home Circuit between 1846 and 1853, with their Results (including child murders).

Total number of trials for murder - - - -	32
Convictions for murder - - - - -	6
Found guilty of manslaughter - - - -	6
Acquittals - - - - - - -	13
Found not guilty, on the ground of insanity - -	5
Found guilty of concealing the birth - - -	2
	32

(Where more than one person was either acquitted or convicted in the same trial, I have treated this as one *conviction* or acquittal.)

In *Sarah Chesham's* case, at the Chelmsford Spring Assizes, 1851, I find I was correct in stating that the fact that the punishment was capital was not mentioned at the trial (see the "Times" Report). It appears that there was no counsel regularly engaged for the prisoner, but that the case was watched by some gentleman, who merely put such questions as the prisoner suggested; and the prisoner afterwards addressed the jury herself. She was found guilty of administering poison with intent to murder, and sentence of death was (contrary, I believe, to the then usual practice in such cases) passed and not recorded.

REFERENCE to some Cases since 1853, in which I consider that the acquittal was due to Capital Punishment (exclusive of child murders).

Robert Palin's case, Kent Winter Assizes, 1855.

Elizabeth Avis Law's case, Kent Spring Assizes, 1855.

There is no Report of this in the "Times," but it is reported in the "Annual Register."

Gentle's case, Hert's Spring Assizes, 1855.

Found guilty of manslaughter.

John White's case, Lewes Spring Assizes, 1859.

Found guilty of manslaughter.

Cleary's case, Lewes Spring Assizes, 1862.

Johann Karl Franz, Croydon, August 6, 1861.

YEARS in which CAPITAL PUNISHMENT was repealed for certain CRIMES.

Extracted from Parliamentary Criminal Tables *for* 1846, *pp.* 8 *and* 9.

In 1832.—"For *cattle, horse* and *sheep stealing*, and *larceney* to the value of 5*l.* in dwelling-houses, by the Act of 2 & 3 Wm. 4. c. 62.
For *forgery*, except of wills and powers of attorney to transfer Government stock, by 2 & 3 Wm. 4. c. 123.

In 1833.—For *house-breaking*, by the 3 & 4 Wm. 4. c. 44.

In 1834.—For *returning from transportation*, by the 4 & 5 Wm. 4. c. 67.

In 1835.—For *sacrilege* and *letter stealing* by servants of the Post Office, by 5 & 6 Wm. 4. c. 81."

In 1837.—"The six Acts of the first year of the present reign abolished Capital Punishment for—

Forgery, in all cases remaining capital, by 1 Vict. c. 84.
Attempts to murder when unattended by bodily injuries dangerous to life, by 1 Vict. c. 85.
Burglary, except when persons in the dwelling are wounded or assaulted, and,
Stealing in dwelling-houses, persons therein being put in fear, by 1 Vict. c. 86.
Robbery, unless wounds are inflicted, by 1 Vict. c. 87.
Piracy, except murder is attempted, by 1 Vict. c. 88.
Arson, except of dwelling-houses when persons are therein, and of ships when life is endangered, by 1 Vict. c. 89.
With *several other offences* which are obsolete or of rare occurrence."

In 1841.—"The Capital Punishment was abolished in 1841, by the Act of the 4 & 5 Vict. c. 56., for—

Rape and *carnally abusing infants.*
Riot, and felonious demolition of property.
Embezzlement by servants of the Bank of England and South Sea Company."

Further extract from the Parliamentary Criminal Tables *for* 1846, *p.* 9.

"Thus the Criminal Law, which only a few years since, subjected to the punishment of Death a trifling theft, even though unattended by any act of violence, has by these extensive changes, been so modified as to restrict that extreme penalty to—

High treason.
Murder, and
Attempts to murder, when bodily injuries are inflicted by which life is endangered.
Unnatural offences.
Arson, when life is endangered.
Piracy, when murder is attempted.
Robbery when wounds are inflicted.
Burglary with violence to persons in the dwelling."

CONSOLIDATION of the CRIMINAL LAW in 1861.

Extract from the Judicial Statistics *for* 1861, *p.* xxiii.

"Since the statutes passed in 1861, for the consolidation of the Criminal Law, have been in operation, by which so many former Acts and parts of Acts have been repealed, *treason* and *murder* remain the *only* crimes for which sentence of death can now be legally pronounced."
—"These statutes came into operation only on the 1st November 1861."

Statistics relating to Capital Punishment, prepared Dec. 1864, by Mr. William Tallack, and referred to in his Evidence.

(1.)—NUMBER OF PERSONS SENTENCED TO DEATH AND EXECUTED.

1828 to 1863—40 Years.

This table shows the marked diminution in the number of Capital Punishments effected by the end of 1832 and 1835. The latter year has been selected as a period in the accompanying tables for comparing various crimes then mostly capital, both nominally and actually, with the more recent years antecedent to 1864.

Years.	Sentenced to Death.	Executed.	Years.	Sentenced to Death.	Executed.
1824	1,066	49	1844	57	16
1825	1,036	50	1845	49	12
1826	1,203	57	1846	56	6
1827	1,526	70	1847	51	8
1828	1,165	59	1848	60	12
1829	1,384	74	1849	66	15
1830	1,397	46	1850	49	6
1831	1,601	52	1851	70	10
1832	1,449	54	1852	61	9
1833*	931*	33*	1853	55	8
1834	480	34	1854	49	5
1835†	523†	34†	1855	50	7
1836	494	17	1856	69	16
1837	438	8	1857	54	13
1838	116	6	1858	53	11
1839	56	11	1859	52	9
1840	77	9	1860	48	12
1841	80	10	1861‡	50‡	15‡
1842	57	9	1862	29	15
1843	97	13	1863	29	22

* Commencement of an era in Capital Punishment.
† End of an era in Capital Punishment. ‡ Consolidation of Criminal Statutes.

(2.)—COMMITMENTS, in Quinquennial Periods (30 years).

(*From the introduction to* "Judicial Statistics" *for* 1859, *page* xvi.)

	1859 to 1855.	1854 to 1850.	1849 to 1845.	1844 to 1840.	1839 to 1835.	1834 to 1830.
Murder	345	348	365	347	315	326
Attempts to murder (stabbing, wounding, &c.) [last execution, 1861.]	1,505	1,249	1,173	1,157	739	605
Manslaughter	1,144	1,144	980	1,050	1,024	912
Rape and attempts to, &c. [last execution for rape, 1834.]	1,239	1,395	1,263	1,221	973	837
Burglary and housebreaking	5,602	5,495	5,462	6,162	3,990	4,201
Robbery on the person, &c.	2,243	2,405	1,782	2,026	1,601	2,025
Cattle, horse, and sheep-stealing [last execution for sheep-stealing, 1831. Ditto horse-stealing, 1829.]	1,492	1,796	2,187	2,984	2,466	2,493
Arson and attempts, &c.	664	913	708	659	294	387
Forgery and uttering forged instruments [last execution, 1829.]	1,043	863	783	781	404	331
Coining and uttering, &c. [last execution, 1828.]	3,418	3,337	1,946	2,047	1,718	1,833

The compilers of the Judicial Statistics observe (p. xvi., Jud. Stat., 1859), in reference to the latter portion of it (burglary to coining), "These com- " parisons are by no means unfavourable." "The whole tendency of crime

" has been for some years to the diminution of offences of violence, and the " increase of offences of planned theft and fraud; skill in crime has succeeded " violence." "In the 30 years over which this comparison extends, the " population cannot be estimated to have increased less than 40 per cent. " (which would account for a corresponding increase of crime), and property, " probably, in a much greater ratio." "The commitments for rape and " attempts to ravish, which on the abolition of the Capital Punishment in " 1841, at once attained a higher rate, have since been without important " change." [This latter statement strongly confirms the popular statement, that the capital penalty when enacted for rape, prevented prosecutions in many cases.] [Attempts to murder were capital, nominally and virtually, during the whole of the above 30 years. The last execution for attempted murder took place in 1861. Manslaughter was not capital throughout the 30 years. The invention of lucifer matches, of later years, is in itself sufficient to account for increased arson. Increase of education, property, and population, together account largely for increased forgery and coining. Cheap postage has also given some facilities for forgery and its concealment. Coining and forgery have not been capital, virtually, during the above period or any part of it.]

(3.)—CONVICTIONS (General).

Per-centage of Convictions arising out of Commitments, in Two Decades, viz. (1) from 1863-54, and (2) from 1835-26; the latter decade being a period when enactments of Capital Punishments, and the executions of the same, were specially numerous. It is submitted that this table clearly indicates that the abolition of the death penalty renders the conviction and punishment of criminals much more certain than the enactment of any other penalty. The low per-centage of convictions for murder, in both decades, is very suggestive.

	Per-centage of Convictions, 1863-54.	Per-centage of Convictions, 1835-26.
Murder	30·29	23·62
Per-centage of executions out of committals	18·23	20·12
Sodomy	32·25	21·30
Rape	39·44	16·14
Manslaughter	45·55	48·30
Arson	56·25	25·54
Attempts to murder	60·21	41·32
Assaults with intent to ravish, &c.	66·80	61·25
Sheep-stealing	70·69	68·38
Horse-stealing	76·66	72·91
Cattle-stealing	77·35	76·48
Forgery	80·03	62·29
All crime in the aggregate	72·49	70·86

Note to No. (3). showing the analysis of the head "murder" in judicial statistics; from the "Judicia Statistics" for 1863, p. 45.

Murder.—Committed for trial, 83; convicted, 29.

Analysis of the 29 convicted.—22 were executed.
7 having had their sentences commuted, were ordered to penal servitude for life.

Of the remaining 54—
7 had "no bill" found, and were therefore not put on trial.
34 were found "not guilty," and acquitted accordingly.
7 were acquitted as insane.
6 were found, or declared, insane.

54

So that none of the 54 were convicted of manslaughter, or other crime

(4.)—MURDER.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed
1863	83	29	22	1835	78	25	21
1862	77	28	15	1834	86	13	12
1861	64	26	14	1833	52	9	6
1860	49	16	12	1832	66	20	15
1859	70	18	9	1831	57	14	12
Five years -	343	117	72	Five years -	339	81	66
1858	66	16	11	1830	65	16	14
1857	70	20	13	1829	47	13	13
1856	82	31	16	1828	83	20	18
1855	57	11	7	1827	65	12	11
1854	62	11	5	1826	57	13	10
Five years -	337	89	52	Five years -	317	74	66
Ten years -	680	206	124	Ten years -	656	155	132
Per-centage of convictions out of committals -			30·29	Per-centage of convictions out of committals -			23·62
Per-centage of executions out of convictions -			60·19	Per-centage of executions out of convictions -			85·16
Per-centage of executions out of committals -			18·23	Per-centage of executions out of committals -			20·12

Population of England and Wales, 1821 - - 12,000,236
" " " 1831 - - 13,896,797
" " " 1861 - - 20,066,224

(5.)—SODOMY.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	61	8	0	1835	18	6	3
1862	31	9	0	1834	32	9	4
1861	41	12	0	1833	23	7	3
1860	34	12	0	1832	23	2	0
1859	40	19	0	1831	13	2	1
Five years -	207	60	None.	Five years -	109	26	11
1858	36	14	0	1830	20	5	4
1857	32	10	0	1829	10	1	0
1856	30	11	0	1828	12	2	0
1855	51	20	0	1827	14	1	1
1854	47	15	0	1826	4	1	1
Five years -	196	70	None.	Five years -	60	10	6
Ten years -	403	130	None.	Ten years -	169	36	17
Per-centage of convictions to committals - -			32·25	Per-centage of convictions to committals - -			21·30

(6.)—RAPE.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	166	75	0	1835	56	4	0
1862	135	55	0	1834	73	11	5
1861	110	36	0	1833	51	7	1
1860	134	53	0	1832	53	16	7
1859	132	56	0	1831	55	9	4
Five years -	677	275	None.	Five years -	288	47	17
1858	136	58	0	1830	54	9	3
1857	121	57	0	1829	54	7	3
1856	113	45	0	1828	41	5	3
1855	128	38	0	1827	48	11	2
1854	128	41	0	1826	29	4	2
Five years -	626	239	None.	Five years -	226	36	13
Ten years -	1,303	514	None.	Ten years -	514	83	30
Per-centage of convictions out of committals -	39·44			Per-centage of convictions out of committals -	16·14		

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N.B.—Rape in this table merely includes the major crime (capital till 1841) of "rape and carnally abusing girls under the age of 10 years."

It does not include the minor crime of "assaults with intent to ravish and carnally abuse." This was not capital during either of the above decades.

(7.)—MANSLAUGHTER.

Last Ten Years.				Ten Years before 1836.			
Years.	Committals.	Convictions.	Executions.	Years.	Committals.	Convictions.	Executions.
1863	251	123	0	1835	189	72	0
1862	267	136	0	1834	230	109	0
1861	204	89	0	1833	215	116	0
1860	208	83	0	1832	176	66	0
1859	238	131	0	1831	150	79	0
Five years -	1,168	562	None.	Five years -	960	442	None.
1858	246	114	0	1830	141	82	0
1857	213	91	0	1829	125	56	0
1856	183	78	0	1828	142	72	0
1855	264	109	0	1827	141	83	0
1854	231	96	0	1826	141	62	0
Five years -	1,137	488	None.	Five years -	690	355	None.
Ten years -	2,305	1,050	None.	Ten years -	1,650	797	None.
Per-centage of convictions out of committals -	45·55			Per-centage of convictions out of committals -	48·30		

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(8.)—ARSON.

N.B.—The invention and general use of lucifer matches, of later years, are *alone* sufficient to account for a large increase of *committals* for arson, by greatly increasing the facilities, as compared with the "tinder box," &c. of the former period.

Note.—The committals for non-capital arson are given as 62, in the Parliamentary *annual* criminal tables for 1834; but as 65 in the Parliamentary Paper No. 65 (217), May 25, 1835. The *former* appears more correct.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	364 14	229 7	0	1835	76 9	10	7
1862	230 4	156	0	1834	68 6	21 2	8
1861	162 5	104 2	0	1833	64	17	9
1860	124 [47]	69 3	0	1832	111	35	16
1859	133 5	79 1	0	1831	102	26	16
Five years -	1,013	637	None.	Five years	421	109	56
1858	116 6	50 1	0	1830	45	15	6
1857	131 7	61 2	0	1829	37	8	3
1856	124 15	64 8	0	1828	14	2	0
1855	144 17	64 7	0	1827	14	3	0
1854	152 16	69 8	0	1826	17	3	1
Five years -	667	308	None.	Five years	127	31	10
Ten years -	1,680 96	945 39	None.	Ten years	548 15	140 2	66
Per-centage of convictions out of committals (*all* for arson.)		56·25		Per-centage of convictions out of committals (for *all* arson).		25·54	
Above ten years' arson (*omitting* arson of crops, &c.), 1,584 committed; 906 convicted; none executed. Here the per-centage of convictions is 57·19.				Above ten years' arson, omitting arson of crops, as separate in tables of Judicial Statistics for 1834 since, but which is *not* separated in Parliamentary return for arson, "No. 471," [dated 9th July 1844, moved for by Mr. Ewart,] committals, 533; convictions, 138; executed, 66. Here the per-centage of convictions is 25·89.			

N.B.—The above table includes arson of a dwelling, persons therein (capital *nominally* till 1861); also arson of houses, warehouses, &c., which ceased to be capital in 1837; and arson of crops, &c. (not capital since 7 & 8 Geo. 4. c. 30).

The non-capital arson (throughout) is also put separately in small figures beside the total, and a separate account made for each decade for arson only *capital in both decades*. But the separation makes little difference in the main result.

Extracted from "Judicial Statistic Papers, No. 471, July 9, 1844; No. (annual), and from Parliamentary May 25, 1835; No. 375, April 10, 1832.

(9.)—ATTEMPTS TO MURDER.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	192	91	0	1835	134	60	2
1862	201	121	1	1834	164	69	5
1861	246	154	0	1833	125	49	5
1860	234	147	0	1832	132	52	2
1859	258	147	0	1831	104	44	3
Five years -	1,131	660	1	Five years -	659	274	17
1858	261	141	0	1830	80	28	1
1857	325	208	0	1829	115	65	10
1856	323	202	0	1828	72	20	5
1855	338	222	0	1827	82	35	6
1854	186	111	0	1826	47	14	1
Five years -	1,433	884	None.	Five years -	396	162	23
Ten years -	2,564	1,544	1	Ten years -	1,055	436	40
Per-centage of convictions out of committals - -		60·21		Per-centage of convictions out of committals - -		41·32	

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N.B.—In the above table the *whole* of attempts to murder are taken for *both* decades. In the latter decade (1854–63), however, only attempts with *dangerous* bodily injuries were capital, and that only till 1861, since which date there remains no capital penalty for any attempted murder not consummated.

(10.)—ASSAULTS, WITH INTENT TO RAVISH, &c.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	253	188	0	1835	131	82	0
1862	157	114	0	1834	120	67	0
1861	163	100	0	1833	118	70	0
1860	106	64	0	1832	123	80	0
1859	131	85	0	1831	103	68	0
Five years -	810	551	None.	Five years -	595	367	None.
1858	161	102	0	1830	87	41	0
1857	109	70	0	1829	108	69	0
1856	120	71	0	1828	128	78	0
1855	88	61	0	1827	111	64	0
1854	125	89	0	1826	117	83	0
Five years -	603	393	None.	Five years -	551	335	None.
Ten years -	1,413	944	None.	Ten years -	1,146	702	None.
Per-centage of convictions out of committals - -		66·80		Per-centage of convictions out of committals - -		61·25	

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(11.)—SHEEP-STEALING.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	98	68	0	1835	221	173	0
1862	145	109	0	1834	237	168	0
1861	102	74	0	1833	266	181	0
1860	84	58	0	1832*	298	219	0
1859	84	60	0	1831	253	162	1†
Five years -	513	369	None.	Five years -	1,275	903	1
1858	130	88	0	1830	297	213	1
1857	175	129	0	1829	237	155	5
1856	198	144	0	1828	201	122	1
1855	212	147	0	1827	251	156	3
1854	219	153	0	1826	190	127	3
Five years -	944	661	None.	Five years -	1,176	773	13
Ten years -	1,457	1,030	None.	Ten years -	2,451	1,676	14
Per-centage of convictions out of committals -		70·69		Per-centage of convictions out of committals -		68·38	

* In 1832 ceased to be capital. † Last execution.

N.B.—Capital Punishment for sheep-stealing was abolished in 1832. Last execution in 1831.

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(12.)—HORSE-STEALING.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	98	68	0	1835	163	120	0
1862	118	94	0	1834	178	131	0
1861	71	58	0	1833	222	166	0
1860	104	79	0	1832*	210	155	0
1859	97	75	0	1831	179	125	0
Five years -	488	374	None.	Five years -	952	697	None.
1858	93	71	0	1830	177	131	0
1857	122	93	0	1829	184	147	6†
1856	125	98	0	1828	177	135	6
1855	93	73	0	1827	229	147	10
1854	129	96	0	1826	171	121	7
Five years -	562	431	None.	Five years -	938	681	29
Ten years -	1,050	805	None.	Ten years -	1,890	1,378	29
Per-centage of convictions out of committals		76·66		Per-centage of convictions out of committals		72·91	

* In 1832 ceased to be capital. † Last executed for horse stealing.

N.B. Sentence of death continued to be pronounced on conviction, till 1832, when this crime ceased to be capital.

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(13.)—CATTLE-STEALING.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	20	17	0	1835	40	25	0
1862	29	24	0	1834	32	21	0
1861	23	16	0	1833	33	32	0
1860	16	13	0	1832*	53	42	0
1859	22	17	0	1831	28	20	0
Five years -	110	87	None.	Five years -	186	140	None.
1858	21	15	0	1830	30	25	0
1857	62	46	0	1829	30	25	0
1856	36	29	0	1828	38	28	0
1855	22	17	0	1827	45	31	0
1854	36	28	0	1826	24	21	0
Five years -	177	135	None.	Five years -	167	130	None.
Ten years -	287	222	None.	Ten years -	353	270	None.
Per-centage of convictions out of committals -	77·35			Per-centage of convictions out of committals -	76·48		

* Till 1832, persons convicted of cattle-stealing were *sentenced* to death.

N.B.—No executions for cattle-stealing took place during either of the above decades; but sentence of death was pronounced, on convictions, until 1832, when the crime ceased to be capital.

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(14.)—FORGERY.

Last Ten Years.				Ten Years before 1836.			
Years.	Committed.	Convicted.	Executed.	Years.	Committed.	Convicted.	Executed.
1863	186	151	0	1835	64	47	0
1862	238	210	0	1834	60	43	0
1861	210	161	0	1833	91	62	0
1860	173	135	0	1832*	81	55	0
1859	185	148	0	1831	56	34	0
Five years -	992	805	None.	Five years -	352	241	None.
1858	186	151	0	1830	43	19	0
1857	226	184	0	1829	56	37	7†
1856	214	156	0	1828	66	42	4
1855	222	175	0	1827	91	46	4
1854	184	149	0	1826	47	23	1
Five years -	1,032	815	None.	Five years -	303	167	16
Ten years -	2,024	1,620	None.	Ten years -	655	408	16
Per-centage of convictions out of committals -	80·03			Per-centage of convictions out of committals -	62·29		

* Capital penalty abolished, except for forging wills and powers of attorney, &c. (1832).
† Last executed.

N.B.—The above table, for both decades, includes forging and uttering Bank

of England notes and "other forged instruments," but does not include "having in possession forged instruments," as distinct from uttering, &c.

The increase of committals for forgery of later years is fully accounted for by the greater facilities afforded by the extension of education, the penny postage, and its aids to concealment, and the increase of population.

Taking the four years ending with 1829, the last year of an execution, we have 260 committals and 148 convictions. This gives us a per-centage of only 56·92 convictions out of committals, whilst forgery remained actually capital.

(15.)—ALL CRIME IN THE AGGREGATE.

Last Ten Years.			Ten Years before 1836.		
Years.	Committed.	Convicted.	Years.	Committed.	Convicted.
1863	20,818	15,799	1835	20,731	14,729
1862	20,001	15,312	1834	20,168	14,443
1861	18,326	13,879	1833	20,072	14,446
1860	15,999	12,068	1832	20,829	14,947
1859	16,674	12,470	1831	19,647	13,830
Five years -	91,818	69,528	Five years -	101,447	72,395
1858	17,855	13,246	1830	18,107	12,805
1857	20,269	15,307	1829	18,675	13,261
1856	* 19,437	14,734	1828	16,564	11,723
1855	* 25,972	19,971	1827	17,924	12,567
1854	29,359	16,509	1826	16,164	11,107
Five years -	112,892	79,767	Five years -	87,434	61,463
Ten years -	204,710	149,295	Ten years -	188,881	133,858
Per-centage of convictions out of committals -	72·49		Per-centage of convictions out of committals -	70·86	

* The great difference between the number of commitments before and after 1855 and 1856, is owing to the operation of the "Criminal Justice Act" of 1855, which thus greatly reduced the totals of committals for trial, by giving justices increased powers of summary conviction.

This result showing the small variation as well as high rate of the per-centage of convictions, is very striking when compared with the low per-centage of conviction for murder and for other crimes whilst capital.

Infanticide.

The following has been suggested by Mr. Justice Willes.

An Act for the Protection of Children at or about their Birth.

1. Every person who shall in any manner endeavour to conceal the birth of a child by secretly disposing of its body, or otherwise, whether such child shall be living or dead, shall be guilty of a misdemeanor (sentence not exceeding two years imprisonment with or without hard labour).

2. Every person who shall by any unlawful means cause injury to any child at or about the time of its being brought forth, whether such child shall be borne alive or not, shall be guilty of a misdemeanor (sentence penal servitude not exceeding 15 years, or imprisonment, with or without hard labour, not exceeding two years).

3. Every person who shall, at about the time of any child being brought forth, cause its death by any unlawful means, shall be guilty of misdemeanor,* and shall upon conviction be subject to penal servitude for not more than 15 nor less than five years, or to imprisonment, with or without hard labour, for any term not exceeding two years.

4. It shall be sufficient for the indictment to state that the accused on or about the day of at in the parish of in the county of by unlawful means injured, or, as the case may be, caused the death of a child at or about the time of its being brought forth.

5. Unlawful means shall include all assaults and acts of the character of an assault, and also all gross and culpable neglect of available means of safe delivery.

6. When upon a trial for causing death, as herein-before mentioned, it shall appear that the unlawful means and the death or either of them happened before birth, the accused shall not be entitled to an acquittal but shall be convicted, unless the Judge thinks fit in his discretion to discharge the jury and commit the accused to take his or her trial for procuring abortion.

7. When upon such trial it shall appear that the unlawful means and the death or either of them happened after birth, the accused shall not be entitled to an acquittal but shall be convicted, unless the Judge think fit in his discretion to discharge the jury and commit the accused to take his or her trial for murder or manslaughter.

8. When upon any trial for murder or manslaughter it shall appear that the person whose death was caused was a child, and that its death was caused by unlawful means at or about the time of its birth, but it shall not appear that or shall be left in doubt whether the unlawful means and the death or either of them happened before birth, the accused shall be acquitted of the murder or manslaughter, but convicted of the misdemeanor, and upon such conviction all proceedings may be had as if the indictment had been for the misdemeanor.

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* Mr. Avory says felony. I think the distinction not important except as to joinder of counts; but his opinion is quite as valuable as mine. (*See* answer 1803, page 236, Minutes of Evidence.)

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